No. ____

IN THE

Supreme Court of the United States

In Re: ADELPHIA COMMUNICATIONS CORPORATION, *et al.*,

Debtors.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS
and W. R. HUFF ASSET MANAGEMENT CO., L.L.C.,

Petitioners,

—against—

ADELPHIA COMMUNICATIONS CORPORATION AND ITS AFFILIATED DEBTORS AND DEBTORS-IN-POSSESSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether in an appeal that presents a substantial issue of federal law and over which there is indisputably statutory and constitutional appellate jurisdiction, the Second Circuit was correct in dismissing the appeal in reliance on a court-created doctrine called "equitable mootness" using a standard derived from the Second Circuit's decisions in *In re Chateaugay Corp. [I]*, 988 F.2d 322 (2d Cir. 1993), and *In re Chateaugay Corp. [II]*, 10 F.3d 94 (2d Cir. 1993), which standard is in conflict with one "equitable mootness" standard in the First, Fifth, Seventh, and Ninth Circuits,* and another standard in the Eleventh and D.C. Circuits,** and which doctrine has never been reviewed by this Court?

Whether in an appeal from decisions of the bankruptcy court and district court approving a settlement among the Debtors, the United States Department of Justice, the Securities and Exchange Commission, and others, the Second Circuit correctly refused to review the legality of a distribution of estate assets to stockholders prior to full payment to all unsecured creditors in direct violation of the exclusive distribution scheme established by the Bankruptcy Code and the Absolute Priority Rule on the grounds that the appeal was equitably moot, even though the law and the equities favored the relief the Petitioners sought and there was an available remedy on the appeal?

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* *See In re Public Serv. Co. of New Hampshire*, 963 F.2d 469 (1st Cir. 1992); *In re GWI PCS 1, Inc.*, 230 F.3d 788 (5th Cir. 2000); *In re UNR Indus.*, 20 F.3d 766 (7th Cir. 1994); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981).

** *See In re Club Assocs.*, 956 F.2d 1065 (11th Cir. 1992); *In re AOV Indus.*, 792 F.2d 1140 (D.C. Cir. 1986).

PARTIES TO THE PROCEEDING BEFORE THE COURT OF APPEALS

Appellants-Cross-Appellees

Official Committee of Unsecured Creditors of Adelphia Communications Corporation

W.R. Huff Asset Management Co., L.L.C.

Ad Hoc Adelphia Trade Claims Committee

U.S. Bank National Association, as Indenture Trustee

Debtors-Appellee

Adelphia Communications Corporation and its affiliated Debtors and Debtors-in-Possession

*Appellees**

Bank of America, N.A.

Bank of Montreal

Wachovia Bank, National Association

*Appellee-Cross-Appellant**

Official Committee of Equity Security Holders of Adelphia Communications Corporation

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* These parties were parties before the Second Circuit Court of Appeals solely with respect to a cross-appeal by the Official Committee of Equity Security Holders concerning issues that are not subject of this Petition.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the undersigned counsel for Petitioner W.R. Huff Asset Management Co., L.L.C. ("Huff") (a private, non-governmental party) certifies that Huff has no parent corporation and that no publicly held corporation owns 10% or more of Huff.

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Petitioners, the Official Committee of Unsecured Creditors of Adelphia Communications Corporation and W.R. Huff Asset Management Co., L.L.C., respectfully request that writ of *certiorari* be issued to review the judgment of the United States Court of Appeals for the Second Circuit in *Ad Hoc Adelphia Trade Claims Comm. v. Adelphia Communications Corp.*, 2d Cir. Nos. 06-1417-BK LEAD, 06-1738-BK XAP (Dec. 26, 2006).

OPINIONS BELOW

The judgment of the Court of Appeals in this case is not reported and is annexed hereto. (App. 1a.)[1] The Court of Appeals denied petitions for rehearing and rehearing *en banc* in an unreported order. (App. 5a.) The opinion and order of the United States District Court for the Southern District of New York that was appealed to the Second Circuit is reported at 337 B.R. 475 (S.D.N.Y. 2006). (App. 7a.) The decisions and orders of the United States Bankruptcy Court for the Southern District of New York that were appealed to the District Court are reported at 327 B.R. 143 (Bankr. S.D.N.Y. 2005) and 327 B.R. 175 (Bankr. S.D.N.Y. 2005), respectively. (App. 15a and 93a.)

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 26, 2006. Timely petitions for rehearing and rehearing *en banc* were denied on February 27, 2007. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of *certiorari* pursuant to 28 U.S.C. § 1254(1).

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[1] Throughout this Petition, reference to the decisions, orders and statutes that are appended hereto shall be in the form "App. _a", and reference to the documents and other evidence submitted by the parties in a Joint Appendix to the Court of Appeals shall be in the form "JA-__".

STATEMENT OF THE CASE

This case arises out of a challenge by virtually all of the unsecured creditors of the bankruptcy estates of Adelphia Communications Corporation ("Adelphia") and its subsidiaries (collectively with Adelphia, the "Debtors")—including the Official Committee of Unsecured Creditors—to the legality of Adelphia's settlement of purported claims by the United States Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC"; collectively, the "Government"). Petitioners challenge that aspect of the settlement that permits the DOJ to distribute $715 million in estate assets the Government received under the settlement to the Debtors' statutorily subordinated shareholders prior to payment in full of the Debtors' unsecured creditors. All parties to this case agree that such payment by the Government, if made directly by the Debtors rather than through the Government conduit, violates the exclusive distribution scheme and payment priorities in Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"), which embodies the fundamental market principle that debt is repaid before equity. Notwithstanding the absence of a dispute among the parties concerning the illegality of the Government's intended—but yet to be made—payment to statutorily subordinated shareholders, the Court of Appeals refused to exercise its indisputable jurisdiction to address this issue, and instead dismissed the appeal based on an application of the court-created doctrine of equitable mootness.

Prior to its recent liquidation, Adelphia was the fifth largest operator of cable systems in the United States. On June 25, 2002, the Debtors filed voluntary petitions for relief under the Bankruptcy Code. (JA-504.) The Debtors' bankruptcies were the direct result of one of the largest frauds in American corporate history. From at least 1999 through March 2002, John Rigas, the President and Chief Executive Officer of Adelphia, his sons Timothy and Michael Rigas, who were also Adelphia executives, along

with other Adelphia insiders, looted over $3 billion from the Debtors for their personal enrichment and with no benefit to the Debtors. The primary vehicles for the Rigases' fraud were privately owned companies ("Rigas Managed Entities" or "RMEs"), that drew down the entire amount—nearly $5 billion—available under various credit facilities, with corporate Debtors owned by Adelphia being directly liable for repayment of all amounts.

On March 27, 2002, the Debtors disclosed that approximately $2.5 billion in debt under the credit facilities—reflecting amounts drawn by the RMEs—had been omitted from Adelphia's public filings. (JA-15.) Thereafter, the Debtors defaulted under the terms of their debt instruments, the value of the securities issued by Adelphia and certain of its subsidiaries plummeted, and governmental agencies commenced investigations into the Rigases' conduct. (JA-15-16.) In May 2002, the Debtors forced John, Timothy and Michael Rigas to resign their various officer and director positions. (JA-293-94, 1116-18.) As of the Petition Date, the Debtors owed approximately $6.8 billion in principal amount of senior secured debt, and owed over $9 billion to their bondholders.

On September 23, 2002, John, Timothy and Michael Rigas (the "Rigas Defendants") were indicted on charges relating to the fraud they perpetrated on the Debtors and the Debtors' unsecured creditors (the "Criminal Action"). (JA-16, 504.) The indictment detailed the extent to which the Rigas Defendants used the RMEs to loot the Debtors and sought, among other things, the forfeiture of not less than $2.5 billion of the proceeds of their criminal conduct, including forfeiture of the RMEs. *Id.*[2] John and Timothy Rigas were convicted of fraud. (JA-17, 505.)

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[2] Prior to the indictment, a grand jury spent approximately two months investigating the Rigas Defendants. (JA-504.) The grand jury did not indict the Debtors, and there were no allegations in the indictment that the Debtors knew of, or participated in, the Rigas Defendants'

On July 24, 2002, the SEC filed a civil enforcement action against Adelphia—but none of the other Debtors—and certain Rigas family members (the "SEC Action"). (JA-18-19, 505.) Like the DOJ, the SEC alleged in its complaint the extent to which the Rigases looted the Debtors through, among other things, the RMEs. In its action, the SEC sought an undisclosed amount of penalties and disgorgement from Adelphia to compensate victims of the Rigases' securities fraud. (JA-296-97, 988.)[3]

Also on July 24, 2002, Adelphia initiated an action against certain Rigas family members and RMEs seeking to recover the billions of dollars that the Rigases looted from the Debtors (the "Rigas Adversary Proceeding"). (JA-20, 505.) In its complaint, Adelphia alleged that the defendants held the billions of dollars and the RMEs that they looted from the Debtors in a constructive trust for Adelphia's benefit (the "Constructive Trust Claim"). (*Id.*)[4]

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criminal activity. (JA-504, 16.) The Debtors actively assisted the DOJ in its investigation and prosecution of the Rigases, providing the DOJ with evidence supporting the charges against the Rigas Defendants and their accomplices. (JA-636-7, 18, 544-56, 274.) At trial, the DOJ proved—relying upon, among other things, significant testimony from the Debtors—that the Rigas Defendants and their accomplices concealed their misconduct from the Debtors, and that the Debtors were innocent victims of this massive fraud. (JA-544-56, 268.)

[3] Although filed in 2002, the SEC Action was stayed pending the Criminal Action, and the SEC never obtained any rulings concerning the validity or viability of its claims. (JA-19.) On July 14, 2004, the Creditors Committee initiated an adversary proceeding against the SEC seeking to subordinate the payment of any amounts in the SEC Action to the payment of those parties who have priority pursuant to the Bankruptcy Code. (JA-19; JA-505.)

[4] On July 6, 2003, the Creditors Committee and the Debtors initiated an action against, among other parties, the lenders participating in the credit facilities (the "Bank Litigation"). (JA-506.) Plaintiffs allege that the agent banks on those facilities and their affiliated investment banks aided and abetted the Rigases in defrauding the Debtors by, among other things, structuring and funding the facilities to allow the

In or about June 2004, Adelphia's new Board of Directors began negotiations with the Government to attempt to settle claims that the DOJ and SEC believed they could assert or already had filed against the Debtors. (JA-287, 397.) The Government demanded that Adelphia pay the historically unprecedented amount of $1 billion.

Over the next ten months, the Debtors repeatedly attempted to engage the Government in negotiations. (JA-243-45.) The Debtors made presentations demonstrating, among other things, that the Government's $1 billion demand was historically unprecedented; the DOJ's own internal guidelines—the Thompson Factors—weighed heavily against the indictment that the Government continued to threaten; and the Debtors had a superior claim to the RMEs over which the Government threatened forfeiture. (JA-289-92, 397-403, 487, 694.) Adelphia's representatives emphasized that payments from any restitution fund should be made in accordance with the distribution scheme established by the Bankruptcy Code. (JA-298, 236.) Although the Government ultimately reduced its demand to $715 million, it insisted that it have complete discretion to disburse restitution funds in any manner it saw fit and expressly communicated its intention to distribute funds to stockholders who would otherwise be subordinated to the unsecured creditors. (JA-294-50, 404.)

Notwithstanding their opposition to the terms of the proposed settlement and the Government's intent to distribute the proceeds in violation of the Bankruptcy Code, the Debtors agreed to the settlement in April 2005. (JA-307-310.) On April 28, 2005, the Debtors moved pursuant to Rule 9019 of the Federal Bankruptcy Rules (the "Rule 9019

Rigases to loot the Debtors. (*Id.*) The Official Committee of Equity Security Holders intervened in the Bank Litigation to join in many of plaintiffs' claims and to assert additional claims against the lenders, including claims for fraud and violation of federal RICO statutes. On August 30, 2005, the Bankruptcy Court granted the Creditors Committee and the Equity Committee standing to proceed with the Bank Litigation.

Motion") for approval of the settlement (the "Settlement"). (JA-11.)

The Settlement resolves, among other things, the Criminal Action, the SEC Action, and much of the Rigas Adversary Proceeding. (*Id.*) The following provisions of the Settlement are relevant to this case:

> 1. The Debtors agreed to pay $715 million in value to the Government in exchange for the Government's agreement not to attempt to prosecute the Debtors for the crimes committed by the Rigas Defendants and the SEC's consent to the entry of a judgment in the SEC Action without the award of penalties or disgorgement against the Debtors. (JA-337.)
>
> 2. The Government is entitled to use the Debtors' payment to establish a victims' restitution fund (the "Restitution Fund") that the Government will distribute to victims of the Rigases' fraud. (*Id.*)[5]
>
> 3. The Debtors received title to certain RMEs—that were funded with the Debtors' looted assets—that the Rigases had forfeited to the Government. (JA-59-60.)

Petitioners and numerous other parties objected to the Rule 9019 Motion, arguing that, among other things, the Settlement was not fair and equitable or in the best interests of the Debtors' estates because it permitted the Government to distribute estate assets to subordinated shareholders ahead of unsecured creditors and was the result of overreaching by the Government. (JA-501, 807.)

On May 20, 2005, the Bankruptcy Court held a hearing on the Rule 9019 Motion. The undisputed evidence proved

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[5] The Restitution Fund is to be administered as a forfeiture fund pursuant to 21 U.S.C. § 853. (JA-983.) The Government intends to appoint a private individual to "administer" the Restitution Fund, who will then attempt to identify "victims" and distribute funds to those victims in his or her sole discretion. (JA-59, 250, 983, 486-87.)

that Adelphia's Board did not support the terms of the Settlement. Indeed, the testimony made clear that the Debtors believed—and still believe—that the Settlement terms are unreasonable, "extortionate," "excessive," and the result of a "shakedown," and that the Debtors agreed to the Government's terms for fear of the "Sword of Damocles" being wielded in the form of a potential indictment and forfeiture of the RMEs. (JA-242-43, 248, 269, 308, 310.) The Government did not present any evidence or argument at the Rule 9019 Hearing.

The Bankruptcy Court approved the Settlement in a Bench Decision (App. 15a) and an Order (App. 78a) dated May 20, 2005 and May 26, 2005, respectively. The Bankruptcy Court acknowledged the Government's intent to distribute the Restitution Fund to subordinated stockholders (App. 62a-67a), but ruled that, because the issue of whether that distribution—when made by the Government and not the Debtors—violates the Bankruptcy Code was an "unsettled" area of law that was a "close call," it was reasonable for the Debtors to resolve the issue by agreeing to permit the Government to distribute the Settlement proceeds in such a manner (App. 64a). The Bankruptcy Court further ruled that it was reasonable for the Debtors to accede to the Government's threats of indictment and forfeiture even if those threats were not legitimate. (App. 59a-60a.)[6]

On May 27 and 31, 2005, Petitioners appealed the Bankruptcy Court's approval of the Settlement. The District Court had jurisdiction to entertain the appeal pursuant to 28 U.S.C. § 158(a)(1). On February 23, 2006, the District Court affirmed "substantially for the reasons given by Judge Gerber." (App. 10a.) In doing so, the court concluded that the

[6] The day after the Bankruptcy Court granted the Rule 9019 Motion, the DOJ conceded to the Court of Appeals in a related matter that the Constructive Trust claim gave the Debtors a superior and indefeasible right to the RMEs that the Government was threatening to seize. (JA-1699-1701, 1748-49.)

Absolute Priority Rule, as embodied in Section 1129 of the Bankruptcy Code, was not applicable to the distribution of the Settlement funds because "any payments from the restitution fund would be from 'a fund to be created and owned by the Government,' not a distribution of assets of the debtors' estates as part of a plan of reorganization." (App. 13a (quoting the Bench Decision).) The District Court also noted—we believe incorrectly—that "if Adelphia had rejected the government's proposal and the government succeeded in forfeiting its assets, the government's interest in the assets would have been superior to those of the creditors in any case." (*Id.*) Finally, the District Court observed that although Petitioners' complaint about the distribution of estate assets in violation of the Bankruptcy Code's distribution scheme was "understandable," the issue supposedly was one for Congress—and not the courts—to resolve. (*Id.*)

On March 23, 2006, Petitioners appealed the District Court's Order. (JA-1852.) Petitioners asserted that the Settlement impermissibly violated the Absolute Priority Rule and the exclusive distribution scheme in the Bankruptcy Code, and infringed upon the judiciary's exclusive province to marshal and equitably distribute debtors' assets. The only relief Petitioners sought was a requirement that the Government distribute the Restitution Fund consistent with the Bankruptcy Code. The Court of Appeals had jurisdiction to entertain the appeal pursuant to 28 U.S.C. § 1291.

On or about May 26, 2006, the Debtors moved pursuant to section 363 of the Bankruptcy Code to sell substantially all their assets to Time Warner NY Cable and Comcast Corporation for $12.7 billion in cash and stock.[7] It is undisputed that the total consideration the Debtors will receive from Time Warner and Comcast is grossly insufficient to provide

[7] Petitioners did not seek a stay of the sale to Time Warner and Comcast because the relief they sought from the Court of Appeals solely involved the Government's distribution of a payment it had yet to receive (and still has yet to distribute).

any distribution to Adelphia's equity security holders under normal bankruptcy priorities.

On or about June 27, 2006, the Bankruptcy Court approved the sale to Time Warner and Comcast (the "Sale Order"). The Sale Order makes no reference to the Settlement or any distributions from the Restitution Fund. The sale closed on or about July 31, 2006. In accordance with the Rule 9019 Order, certain RMEs that were forfeited to the Government were conveyed to Adelphia, which conveyed those assets to the purchasers at the closing. Although the Government and the purchasers were on notice of Petitioners' appeal of the Settlement, neither required that the appeal be dismissed as a condition to the conveyances.

The Debtors moved shortly after the closing to dismiss Petitioners' appeal as equitably moot because Petitioners had not sought a stay of the Sale Order. In response, Petitioners asserted that their appeal was not equitably moot because the courts still could fashion the only relief Petitioners sought—an order requiring the Government to distribute the Restitution Fund in accordance with the priorities established by the Bankruptcy Code—without undoing the Sale Order, and because the Government had yet to distribute, or even receive, any funds pursuant to the Settlement. Moreover, Petitioners asserted that the Government could not be prejudiced by the relief Petitioners sought because the Government did not have a right to distribute the Restitution Fund in an illegal manner.

In response to an invitation from the Court of Appeals, each of the DOJ and the SEC filed an amicus brief. They asserted—for the first time in these proceedings—that the Government would not have entered the Settlement if it did not have absolute discretion to disburse the Restitution Fund in any manner it saw fit, including in violation of the Absolute Priority Rule.

On December 26, 2006, the Court of Appeals dismissed Petitioners' appeal on the grounds of equitable mootness.

(App. 1a.) The court, relying upon *In re Chateaugay Corp. [I]*, 988 F.2d 322, 325 (2d Cir. 1993), and *In re Chateaugay Corp. [II]*, 10 F.3d 944, 949-50 (2d Cir. 1993), ruled that because Petitioners did not seek a stay before the Government had performed its Settlement obligations in connection with the Sale Order, Petitioners were required to demonstrate that the relief they sought—that the Government distribute the Restitution Fund in accordance with the priorities under the Bankruptcy Code—would not create inequitable results. (App. 3a-4a.) The court concluded that it would be "grossly inequitable" to require the Government to comply with the priorities in the Bankruptcy Code because the Government—and only the Government—would be denied the benefit of its bargain if such a requirement were imposed. (App. 4a.) The court based its conclusion on the Government's argument in its briefs that it believed it had legitimate grounds for indicting and obtaining forfeiture over Adelphia, but declined to pursue those actions in exchange for the creation of a restitution fund to compensate defrauded investors. (App. 3a-4a.) Finally, the Court of Appeals refused to consider the significant merits of Petitioners' appeal—namely, the importance of ensuring compliance with the Absolute Priority Rule—in connection with its application of equitable mootness. (App. 4a.)[8]

On January 5, 2007, the Bankruptcy Court confirmed the Debtors' plan of reorganization, which incorporates the Settlement. It is undisputed that unsecured creditors will be paid under the plan at least $1 billion less than the amount of their claims. It is also undisputed that the Government, which has received a significant portion—but not all—of

[8] Two months after dismissing Petitioners' appeal, the Second Circuit held in another case that settlements under Bankruptcy Rule 9019 must comply with the Absolute Priority Rule and that whether a proposed settlement complies with the priorities in the Bankruptcy Code is the most important factor—and in most cases, the dispositive factor—in determining whether a settlement can be approved. *See In re Iridium Operating LLC*, 478 F.3d 452, 455 (2d Cir. 2007).

the payment under the Settlement, has not yet distributed any amounts but has stated that it intends to distribute the $715 million it receives from the Debtors' estates to equity security holders who otherwise would not be entitled to any payment under statutory priorities.

On February 27, 2007, the Court of Appeals denied the petition for rehearing and rehearing en banc. (App. 5a.)

REASONS FOR GRANTING THE WRIT

Introduction

This case presents two issues, each of which independently calls for this Court's consideration.

First, the Second Circuit Court of Appeals had statutory and constitutional jurisdiction in this appeal over what it acknowledged were important issues of federal law, but nonetheless dismissed the appeal based on its unique formulation of a doctrine that has come to be known as "equitable mootness." That doctrine is intended to foster reliance on the finality of substantially consummated settlements and plans of reorganization in bankruptcy—a principle with which Petitioners do not quarrel—but it has been crafted in decisions from nearly all of the Circuit Courts of Appeals that conflict with one another. This conflict among the Circuit Courts of Appeals has had the contrary effect of eliminating certainty as to when and whether an appellate court will exercise its jurisdiction to hear an appeal. This Court has never ruled on the right of an appellate court to decline to hear a bankruptcy appeal over which it unquestionably has jurisdiction on these grounds and, therefore, has not had an opportunity to bring uniformity among the differing standards in the various Circuits.

The decision below relied on standards set forth in two earlier Second Circuit decisions, *Chateaugay I*, 988 F.2d 322 (2d Cir. 1993), and *Chateaugay II*, 10 F.3d 944 (2d Cir.

1993), which together held that where a settlement or a plan of reorganization has been "substantially consummated" before an appeal can be heard, there is a presumption that it should be deemed final and unappealable. In order to rebut this presumption of "equitable mootness" under the Second Circuit's standard, the appellant has the burden to establish (as discussed more fully in Part I of this Petition) that the appellant acted diligently to stay the order below and that it would not be inequitable for the court to fashion some effective relief. This rebuttable presumption differs from the standards for equitable mootness in each of the other circuit courts that has adopted the doctrine. The conflict among the circuits has brought uncertainty to debtors and creditors as to whether and when settlements or plans of reorganization will be immune from review.

Indeed, the Seventh Circuit has acknowledged that the term "equitable mootness" is misleading because "[t]here is a big difference between inability to alter the outcome (real mootness) and unwillingness to alter the outcome ('equitable mootness'). Using one word for two different concepts breeds confusion." *In re UNR Indus.*, 20 F.3d 766, 769 (7th Cir.), *cert. denied*, 513 U.S. 999 (1994). This "confusion" was later acknowledged by the Third Circuit when it adopted its own version of equitable mootness, in an *en banc* decision, on a vote of seven to six, in which the majority surveyed versions of the doctrine among the circuits before crafting its own test, and the dissent opined that the new test was not "consistent with the law of all of the circuits that the majority claims to be following." *In re Continental Airlines*, 91 F.3d 553, 568 (3d Cir. 1996) (Alito, J., dissenting), *cert. denied*, 519 U.S. 1057 (1997). No circuit other than the Second Circuit uses the rebuttable presumption structure that shifts the burden to the appellant to demonstrate that it would not be inequitable to dismiss the appeal.

While the importance of finality following substantial consummation of a settlement or plan of reorganization in

bankruptcy is beyond debate, finality should not be sanctified such that it prevents appellate courts from determining whether the underlying legal issue deserves consideration. Nor should finality permit appellate courts to avoid determining whether efforts should be made to implement relief that satisfies both the legal and equitable rights of the affected parties. As we develop in Part I, the Second Circuit's overbroad equitable mootness standard does not require a consideration of the legal merits of an appeal or even whether it would be practicable to fashion some form of equitable relief that protected the paramount federal rights of senior creditors. In doing so, the Second Circuit applied a standard that was more restrictive than other circuits. In particular, the D.C. Circuit in *In re AOV Indus.*, 792 F.2d 1140 (D.C. Cir. 1986), and the Eleventh Circuit in *In re Club Assocs.*, 956 F.2d 1065 (11th Cir. 1992), require that an appellate court consider the legal merits and the remedial effect of the issue on appeal before determining whether it would be equitable to allow the appeal to proceed. Had the Second Circuit applied this standard, it would have determined not only that it could fashion equitable relief, but that the relief sought by Petitioners—that estate assets be equitably distributed among *all* stakeholders in accordance with the exclusive distribution scheme set forth in the Bankruptcy Code—was more equitable than the proffered governmental interests served by the dismissal. Regardless, it is vitally important that this Court bring consistency to the standard for the concept of finality, whether it is called "equitable mootness" or some other term.

Second, even assuming that the Second Circuit's version of "equitable mootness" states a proper standard for determining whether to hear an appeal from a consummated settlement, the Court used that doctrine to avoid deciding a matter of crucial importance regarding the Absolute Priority Rule under the Bankruptcy Code. By failing to determine the merits of this underlying federal question under the facts presented here, the court deprived the parties, and indeed

itself, of the opportunity to fashion relief that would have fostered this federal principle without upsetting the balance that equitable mootness seeks to preserve.

Pursuant to the Settlement, the Debtors will forfeit $715 million in estate assets to the Government, which the Government intends to distribute to the Debtors' shareholders ahead of unsecured creditors in violation of the Absolute Priority Rule. No plan for such distribution has yet been promulgated and no payment has yet been made to any subordinated shareholder. The Government asserts—without any legal basis—that it is entitled to distribute these forfeited funds without regard to the Absolute Priority Rule. It further asserts that it bargained for the unfettered right to distribute those funds regardless of the statutory strictures that would otherwise apply rather than seek forfeiture of other assets (which it subsequently conceded it would not be able to obtain), and rather than seek to indict Adelphia for the fraud committed by Adelphia's ousted insiders.

But the Government's insistence that equitable mootness immunizes its right to distribute the funds as it sees fit demonstrates the error of the doctrine as defined by the Second Circuit. Clearly, on appeal, after determining that the primary importance of the Absolute Priority Rule requires the appellate courts to consider the legality of this term of the Settlement, the courts can do the greatest equity by fashioning relief that would distribute the forfeited funds in a manner that complies with that rule. All other terms of the Settlement could be preserved without upsetting the expectations of any party—other than perhaps those of the Government, which cannot reasonably seek to vindicate a right to pay subordinated parties in violation of federal law and certainly knew that such "right" was at risk of reversal on appeal. It is clearly more equitable to preserve the established statutory rights and expectations of the Debtors' creditors and to reverse the illegal distribution scheme that the Government wishes to implement.

I.

There Is A Circuit Conflict On The Legal Standard For Determining Whether An Appeal From A Bankruptcy Court's Approval Of A Settlement Or Plan Of Reorganization Should Be Dismissed On The Grounds Of Equitable Mootness

A. As this Court held long ago in *Mills v. Green*, 159 U.S. 651, 653 (1895):

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.

This principle, known as Article III mootness, renders a dispute not justiciable and requires that an appellate court dismiss an appeal where it is "impossible for the court to grant 'any effectual relief whatever' to a prevailing party." *Church of Scientology v. United States*, 506 U.S. 9, 12 (quoting *Mills, supra*) (1992). By contrast, an appeal is justiciable where "a court can fashion *some* form of meaningful relief," even though it "may not be able to return the parties to the *status quo ante*." *Id.* at 12. Indeed, this Court has stated that the courts have a "virtually unflagging obligation" to exercise their jurisdiction where it exists. *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976).

Despite these well-established *jurisdictional* principles under Article III, the various circuit courts have crafted the doctrine of "equitable mootness," applicable solely to bankruptcy proceedings, whereby appellate courts dismiss appeals—*even though some form of meaningful relief may be crafted* and the courts unquestionably have jurisdiction—in order to satisfy "the important public policy favoring orderly reorganization and settlement of debtor estates by 'affording finality to the judgments of the bankruptcy court.' " *In re Public Serv. Co. of New Hampshire*, 963 F.2d 469, 471-72 (1st Cir.), *cert. denied*, 506 U.S. 908 (1992). Each of the circuits that has adopted the equitable mootness doctrine has formulated its own version, but the various standards can be divided generally into three conflicting approaches:

> i. Those, like the Second Circuit here, that will dismiss an appeal even though the relief sought by appellants is practicable, where there has been "substantial consummation" of the debtor's reorganization or settlement and the court determines on a subjective basis that it would not be "equitable" to grant the requested relief. *Chateaugay I*; *Chateaugay II*; *Continental*, *supra*.
>
> ii. Those that will dismiss an appeal where the court determines on an objective basis that there is no "practicable" form of relief that can be granted without affecting the interests of other parties that relied on the finality of the bankruptcy court's approval, most of whom are not parties to the appeal. *In re GWI PCS 1 Inc.*, 230 F.3d 788 (5th Cir. 2000); *In re UNR Indus.*, *supra*; *In re PSC*, *supra*; *Central States S.E. & S.W. Areas Pension Fund v. Central Transport, Inc.*, 841 F.2d 92 (4th Cir. 1988); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981).
>
> iii. Those that consider the merits and the importance of the underlying legal issue on which the appellant seeks review in order to balance the equities between

> the interests of the appellant and those of other parties who claim to have changed their positions in reliance on the finality of the bankruptcy court's approval. *In re Club Assocs.*, 956 F.2d 1065, 1071 (11th Cir. 1992); *In re AOV Indus.*, 792 F.2d 1140, 1148 (D.C. Cir. 1986).

The Second Circuit applied the first, subjective, test here, holding that because Petitioners did not obtain a stay and the Government had "substantially performed" its Settlement obligations during the pendency of the appeal, the burden shifted to Petitioners to "demonstrate that the relief they seek would not create inequitable results." (App. 3a-4a (citing *Chateaugay II*, 10 F.3d at 949-50).) The court did not consider whether effectual relief could be crafted without interfering with the aspects of the Settlement that had already been consummated; nor did it consider the importance of the legal issue on appeal. Instead, the court looked only to its view of the equities, determining that Petitioners had not met their burden to establish that it would not be inequitable to grant the relief requested: a requirement that the Government distribute the $715 million that Adelphia forfeited to it under the Settlement to creditors according to the Absolute Priority Rule. Thus, the court's dismissal based on equitable mootness created a result that is far less equitable than the relief sought by the appeal.

The Third Circuit adopted a similar version of "equitable mootness" in *Continental*, 91 F.3d 553, albeit in a sharply divided *en banc* decision where the court split by a vote of seven to six. The majority agreed with the Second Circuit that "an appeal should be dismissed as moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable." *Id.* at 559 (citing *Chateaugay I*). The court did not rely simply on the existence of "substantial consummation", but it "assume[d] arguendo that even after substantial or total consummation of its reorganization, some effective relief would have been available . . . at the time they appealed."

Nonetheless, the court concluded that it would not be prudent to reach the merits or equitable to grant relief where investors had taken some action in reliance on the plan's finality. *Id.* at 561. As the dissent stated:

> [T]he majority does this even though (a) this case is clearly not "moot" in any proper sense of the term, (b) we unquestionably have statutory jurisdiction, and (c) we have a "virtually unflagging obligation" to exercise the jurisdiction we have been given. [citing *Colorado River*, 424 U.S. at 817]. . . . I am not convinced that the majority's test is consistent with the law of all the circuits that the majority claims to be following.

Id. at 568-69 (Alito, J., dissenting). After surveying the other circuits, the dissent concluded that the majority's "equitable mootness" doctrine:

> does not present a jurisdictional question; we are not required to consider it before proceeding to the merits; and even if we find that it is applicable, it does not necessarily dictate that we dismiss the appeal or affirm in its entirety a district court order of dismissal. Rather, we retain the ability to craft, or to instruct the district or bankruptcy courts to craft, a remedy that is suited to the particular circumstances of the case. Thus, a remedy could be fashioned in the present case to ensure that the Continental reorganization is not undermined.

Id. at 571-72.[9] Nonetheless, the majority adopted the Second Circuit's subjective "equitable" test, which conflicts with each of the other two tests.

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[9] In two subsequent decisions, the Third Circuit still followed *Continental* as controlling law, but applied that standard much more narrowly, focusing primarily on whether the plan had been so substantially consummated in a practical sense that it would be nearly impossible to unravel if the appeal were to proceed. *In re Zenith Elec. Corp.*, 329 F.3d 338, 343-45 (3d Cir. 2003); *In re PWS Holding Corp.*, 228 F.3d 224, 236 (3d Cir. 2000). Thus, the Third Circuit has apparently moved closer to the objective "practicability" test rather than the Second Circuit's more

First, it conflicts with the objective "practicability" standard used in five other circuits. As the Fourth Circuit held in *Central States*, 841 F.2d at 96, "dismissal of the appeal on mootness grounds is required when implementation of the plan has created, extinguished or modified rights, particularly of persons not before the court, to such an extent that effective judicial relief is no longer practically available." Similarly, in the Ninth Circuit, in a decision that many courts credit with creating "equitable mootness," an appeal will be dismissed where the "plan of arrangement has been so far implemented that it is impossible to fashion effective relief for all concerned" and reversal would "knock the props out from under the authorization for every transaction that has taken place, [and] would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court." *Roberts Farms*, 652 F.2d at 797.[10]

In the First Circuit as well, the court looks to the practicability of unwinding a substantially consummated reorganization:

> Appellate reversal of an order confirming a substantially consummated reorganization plan constructed within the framework of so many 'intricate and involved transactions[ ] . . . solely [founded on] the

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subjective, purely equitable test, but it has not fully adopted the *Continental* dissent's preference for reaching the underlying legal issues in order to determine whether it is possible to grant some form of relief.

[10] More recently, the Ninth Circuit reaffirmed the *Roberts Farms* practical approach when it refused to dismiss an appeal where, like here, the relief sought did not "present[ ] transactions that are so complex or difficult to unwind" and would "require only that one party disgorge money it has received, money that would then be distributed pursuant to the bankruptcy court's final decree." *In re Focus Media, Inc.*, 378 F.3d 916, 924 (9th Cir. 2004), *cert. denied*, 544 at U.S. 968. *See also In re Int'l Environmental Dynamics*, Inc., 718 F.2d 322, 326 (9th Cir. 1983) (appeal not dismissed where "court could fashion effective relief" affecting a party even after substantial consummation but without upsetting the reorganization).

> order confirming the plan . . .' would present a daunting assignment for the Humpty Dumpty repairman.

In re PSC, 963 F.2d at 474-75. This concept of impracticability or near impossibility is akin to this Court's Article III mootness principle in which there is no appellate jurisdiction because it is impossible to grant any effectual relief whatsoever. These circuits recognize that some form of relief may be effectual in remediating the harm that the appellant has suffered, but it would be so impracticable that it would not be prudent for the appeal to proceed and upset the public policy in favor of finality in bankruptcy.

Furthermore, when the circuits that follow this practicability principle look to the equities, they concern themselves with the impact that a grant of relief would have on "innocent third parties" who are not parties to the appeal and over whom the courts have no jurisdiction. *Id.* at 475 (unraveling the plan "would work incalculable inequity to many thousands of innocent third parties" who are not before the court); *In re GWI PCS 1*, 230 F.3d at 802-03 (after determining that numerous transactions had been completed following approval of the reorganization, the court looked to "whether the requested relief would affect the rights of parties not before the court or the success of the reorganization plan").

The Seventh Circuit has taken particular note of the similarities and differences between this "practicability" approach and traditional mootness principles. In *In re UNR Indus.*, 20 F.3d at 769, the court found that "[s]ince the plan went into effect, more than 15 million shares of New UNR have been distributed . . . , [w]arrants for additional stock have been issued and are trading . . . , [c]orporate acquisitions and divestitures (not to mention ordinary commercial transactions) have occurred," and other steps had been taken in furtherance of reorganization. The court noted that

"[u]ndoing all of this is impossible. Undoing part of it . . . is possible but has ramifications for the rest of the plan." *Id.* After surveying other circuits that had adopted equitable mootness, Judge Easterbrook stated:

> There is a big difference between inability to alter the outcome (real mootness) and unwillingness to alter the outcome ("equitable mootness"). Using one word for two different concepts breeds confusion. Accordingly, we banish "equitable mootness" from the (local) lexicon. We ask not whether this case is moot, "equitably" or otherwise, but whether it is prudent to upset the plan of reorganization at this late date.

Id.[11] The court concluded that "it is the reliance interests engendered by the plan, coupled with the difficulty of reversing the critical transactions, that counsels against attempts to unwind things on appeal." *Id.* at 770.

Finally, the third approach, adopted in the Eleventh and D.C. Circuits, is akin to what was counseled by the dissent in *Continental*. The D.C. Circuit looked first to the origins of the doctrine in *Roberts Farms* and opined that it had been misinterpreted by subsequent courts.

> *Roberts Farms* does not stand for a bright-line rule that "substantial consummation" forecloses any possibility of relief from court- and creditor-approved reorganization plans. The opinion leaves undisturbed the notion that some claims may not be inescapably bound to the degree of implementation. . . . In exercising its discretionary power to dismiss an appeal on mootness grounds, a court cannot avoid its obligation to scruti-

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[11] In a subsequent Seventh Circuit case, Judge Posner reiterated that the term "equitable mootness" had been "anathematized" by Judge Easterbrook and the doctrine is more properly "an application of the age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties." *In re Envirodyne Indus.*, 29 F.3d 301, 304 (7th Cir. 1994).

> nize each individual claim, testing the feasibility of granting the relief against its potential impact on the reorganization scheme as a whole. "Substantial consummation" is not a blanket discharge of this judicial duty to examine carefully each request for relief.

In re AOV, 792 F.2d at 1148. The court determined that it had an obligation, in the absence of Article III mootness, to consider the merits of the appellants' claims and determine whether some form of relief can be fashioned that protects the appellants' legitimate legal interests, but "will not implicate or have an adverse effect on the interests of other, non-party creditors, and . . . will not affect the re-emergence of the debtor as a revitalized corporate entity." *Id.* at 1149.

This reasoning was followed by the Eleventh Circuit in *In re Club Assocs.*, 956 F.2d 1065. The court noted that "[c]entral to a finding of mootness is a determination by an appellate court that it cannot grant effective judicial relief," but it recognized that "[e]ven if substantial consummation has occurred, a court must still consider all the circumstances of the case to decide whether it can grant effective relief." *Id.* at 1069. The Eleventh Circuit agreed with *AOV* that this consideration included an obligation to examine the claims presented and weigh the impact of the relief sought on the consummated reorganization. *Id.* "The concept of mootness is based upon the premise that a court will undertake the task of carefully examining each issue presented on appeal." *Id.* That court ultimately determined that all of the appellant's claims and requests for relief would in fact "have jeopardized the Plan as a whole," and would have adversely affected non-parties whose "interests cannot be protected in the event of a reversal of the Confirmation Order." *Id.* at 1070-71.

It is clear, then, that the present case would have been judged under a different and more appropriate jurisprudential standard in the Eleventh and D.C. Circuits. Those standards (and the standard espoused by the dissent in the

Third Circuit) are more consistent with this Court's statements of Article III mootness and the obligation of courts to exercise the jurisdiction that they do have (*see Mills, supra*; *Colorado River, supra*), while still satisfying the policy in favor of finality in bankruptcy. While the Second Circuit looks to substantial consummation as the most important factor (despite the ability to fashion some effective relief), such that it shifts the burden to the appellant to demonstrate that it would not be inequitable even to consider its appeal, the Eleventh and D.C. Circuits hold that substantial consummation is only one factor, and not the most important one, in determining whether effective relief is available and should be granted. Those courts look to the merits of the individual claims and the need to protect the interests of third parties beyond the court's jurisdiction who relied on the finality of the plan approval order. The Second Circuit never even considered the issue on which Petitioners sought review. As more fully discussed in Part C of this section, had the Second Circuit followed the standard applied in the Eleventh and D.C. Circuits, it would have recognized that Petitioners' Absolute Priority Rule claim had substantial merit; that the relief sought by Petitioners would have done more equity than dismissal of the appeal; that the relief sought would have negatively impacted only one party that was present at all times; and that the relief would not have been adverse to the interests of that party nor undermined the Debtors' reorganization.

B. The Second Circuit also put great reliance on the Petitioners' decision not to obtain a stay of the Bankruptcy Court's order pending appeal. (App. 3a-4a.) This issue also would have been treated differently in other circuits (and by the dissent in *Continental*). The Eleventh Circuit held that "[d]espite the appearance that a failure to obtain a stay is a blanket discharge of an appellate court's duty to review a bankruptcy court's confirmation order, the fact remains that the absence of a stay does not compel a finding of mootness in all cases." *In re Club Assocs.*, 956 F.2d at 1070 n.13.

Similarly, the D.C. Circuit held "that failure to secure a stay is not per se dispositive of all the issues before us." *In re AOV*, 792 F.2d at 1147. In both cases, the courts considered the merits of the appeals and the impact that some form of relief would have on the consummated reorganization and innocent third parties. Here, the Second Circuit did neither, applying its own subjective mootness standard.

Again, the dissent in the Third Circuit sought to apply a more practical approach similar to that adopted in the Eleventh and D.C. Circuits. The dissent stated:

> [Appellants'] failure to obtain a stay in this case might limit the relief that would be available to them if they succeeded on the merits of the appeal, but it cannot justify the refusal at the outset even to consider their arguments.

Continental, 91 F.3d at 572 (dissent). It is this standard that should have been applied by the Second Circuit here. Instead, the Second Circuit improperly used its version of "equitable mootness" to decline to exercise its indisputable jurisdiction and to preclude any consideration of the merits or the practicability of some form of effectual relief.

C. Had the Second Circuit considered whether there was any merit to the issues and whether it might be possible to fashion some form of effective relief, it would have recognized the import of several indisputable facts. First, the issue on appeal involved the paramount importance of the Absolute Priority Rule, which this Court and others have found to be so important for a bankruptcy court to consider in approving a plan or a settlement that it will often be the dispositive factor. See Point II, *infra*. Second, the relief Petitioners requested would not have adversely or inequitably impacted any party that was beyond the court's jurisdiction. It affected only parties to the Settlement, all of whom were within the court's jurisdiction. Third, Petitioners' request for relief did not seek to overturn the entire Settlement and would not have affected the implementation of any reor-

ganization or undermined the central aspects of the Settlement. The relief would have affected only the Government's desire to distribute the $715 million forfeiture fund in a manner that was contrary to the Absolute Priority Rule. Those funds have not yet been distributed and they remain in the hands of the Government.[12] The only thing the Government would be prohibited from doing if Petitioners succeed on appeal would be to distribute those funds in an illegal manner contrary to the Absolute Priority Rule—which is certainly not a "right" that it could legitimately have expected would be immune from appellate review.

The Second Circuit did not consider any of these factors that would have been central to the analysis in the other circuits. Its only concerns were that Petitioners had not sought a stay and there had been substantial consummation of the Settlement while the appeal was pending. That constricted and overly cabined focus was improperly held to foreclose the court from exercising its jurisdiction to hear this appeal. In the face of the conflicting standards among the circuits, and the fact that this Court has never spoken to the issue of equitable mootness, this petition for writ of *certiorari* should be granted.

II.

Even Under The Second Circuit's Standard Of Equitable Mootness, The Court Of Appeals Should Have Fashioned The Relief Sought By Petitioners Because The Equities Weighed In Favor Of Such Relief

The Bankruptcy Code was established to provide a comprehensive system for marshalling and distributing the assets of a bankrupt entity to its creditors. *See* Thomas D.

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[12] Only $600 million has been turned over to the Government. Pursuant to the Settlement, the remaining $115 million will be paid when, and if, the post-confirmation estate recovers at least $230 million from the Bank Litigation. Thus, this part of the Settlement has not been fully consummated.

Crandall et al., The Law of Debtors and Creditors, § 10 (2002). This Court has observed that the Bankruptcy Code reflects a congressional intent, among other things, to achieve equality of distribution of a Debtor's assets among creditors of equal priority. *Begier v. IRS*, 496 U.S. 53, 58 (1990) (citing H. R. Rep. No. 95-595, at 177 (1977)) (discussing the policy underlying the Code's definition of property of the estate).[13] Thus, the Bankruptcy Code preempts any federal non-bankruptcy statute—like the forfeiture statute under which the Government proceeded here—that purports to affect priorities within a bankruptcy case without expressly superseding the Code. Collier, *supra*, ¶507.02[3][a]. A federal statute should not be enforced so as to upset the distribution scheme established by the Bankruptcy Code. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) (provisions of the National Labor Relations Act did not affect a trustee's authority under 11 U.S.C. § 365 to reject a collective bargaining agreement). Yet that is precisely what the Government Settlement improperly does.

The Bankruptcy Code establishes an exclusive distribution scheme setting forth the priority in which creditors are to be paid from the proceeds of estate property, which furthers the goal of equitably distributing a bankrupt's assets

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[13] One of the primary reasons the Bankruptcy Code was promulgated was to resolve the problem of the inequitable distribution of estate assets outside the purview of the bankruptcy courts. *See* Bankruptcy Law Commission, *Report of the Commission on the Bankruptcy Laws of the United States*, HR Doc. No. 93-137, Part I (1973), reprinted in 4 Lawrence P. King, et al., *Collier on Bankruptcy*, App. Pt. 4(c) (15th Ed. Rev. 2006) at 4-260. To rectify these flaws, the Commission recommended a comprehensive statutory scheme designed to ensure that estate assets were not improperly siphoned off prior to bankruptcy, or at any other juncture. *See id.* Thus, bankruptcy courts are vested with jurisdiction "exclusive of all other courts" to collect and distribute a bankrupt's assets and to enter judgments necessary to enforce the provisions of the Code. *See* 28 U.S.C. 1334(e) and 11 U.S.C. § 105; see also *Pepper v. Litton*, 308 U.S. 295, 304 (1939); *Katchen v. Landy*, 382 U.S. 323, 328-30 (1966); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 57-58 (1989).

among all stakeholders and protecting those assets from the encroachment of special interests. *See, e.g.*, 11 U.S.C. §§ 507, 1129. As this Court has observed, that statutory scheme—referred to as the Absolute Priority Rule—requires that, unless a class of creditors is paid in full, the "holder of any claim or interest that is junior to the claims of such impaired unsecured class will not receive or retain under the plan on account of such junior claim or interest any property." *Bank of Am. Nat'l Trust Savings Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441-42 (1999).[14]

The Absolute Priority Rule also is embodied in section 510(b) of the Bankruptcy Code, which subordinates claims arising out of the purchase or sale of a security to all claims senior to the security claim. 11 U.S.C. § 510(b). Congress specifically designed section 510(b) to preserve the creditor-shareholder hierarchy by prohibiting holders of claims with lower priority in a debtor's capital structure from improperly elevating them through an action for damages in connection with their acquisition of the security. In *In re Stirling Homex Corp.*, 579 F.2d 206, 210 (2d Cir. 1978), the Second Circuit observed:

> If the claims of alleged defrauded stockholders are not subordinated to the claims of conventional general unsecured creditors, a wholly new element will have

[14] The Absolute Priority Rule reflects a fundamental tenet of business law and the fair and efficient operation of the markets. A "stockholder's interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors." *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106, 116 (1939). *See also* Elizabeth Warren, 54 U. Chi. L. Rev. 775, 792 ("An almost axiomatic principle of business law is that, because equity owners stand to gain the most when a business succeeds, they should absorb the costs of the business's collapse—up to the full amount of their investment."). Creditors extend credit in reliance upon the "cushion" provided by equity investors. *In re Granite Partners*, 208 B.R. 332, 336 (Bankr. S.D.N.Y. 1997). That cushion is unfairly diluted when those investors' claims are treated equally with creditors. *Id.*

> been created in the financial structure of business. No longer will creditors, whether banks, suppliers, or subcontractors, be free as they now are to extend credit in the ordinary course of business on their presumed right to be accorded priority over the claims of investors and speculators in securities, without first obtaining a secured basis which will guarantee them a priority status in the event their customer defaults. Such a fundamental change in the financial structure of the business community is unwarranted in the absence of legislation designed to overturn the long established rule of absolute priority.

Thus, to be fair and equitable, a plan of reorganization must comply with the Absolute Priority Rule. 11 U.S.C. § 1129; *see also SEC v. American Trailer Rentals*, 379 U.S. 594, 611-12 (1965) ("fair and equitable" are terms of art meaning that "senior interests are entitled to full priority over junior ones"). Moreover, it is established law that settlements by debtors also must comply with the Absolute Priority Rule in order to be "fair and equitable." *See Protective Comm. for Indep. Stockholders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414 (1968) ("The requirements of §§ 174 and 221(2) of Chapter X, 52 Stat. 891, 897, 11 U.S.C. §§ 574, 621(2), that plans of reorganization be both 'fair and equitable,' apply to compromises just as to other aspects of reorganizations.") Courts of Appeals, including the Second Circuit, have concluded that whether a proposed settlement respects the Absolute Priority Rule will be the most important—in most cases, the dispositive—factor in determining whether that settlement can be approved. *See In re Iridium Operating LLC*, 478 F.3d 452, 455 (2d Cir. 2007) (rejecting aspect of settlement that gave junior creditors right to payment from residual litigation recoveries ahead of senior creditor); *In re AWECO, Inc.*, 725 F.2d 293 (5th Cir.), *cert. denied*, 469 U.S. 880 (1984) (bankruptcy court must apply fair and equitable standard in considering priority creditor's objections to settlement).

It is beyond dispute that the Government's intention to pay $715 million of the Debtors' assets to subordinated stockholders before all unsecured creditors have been paid in full violates the exclusive equitable distribution scheme in the Bankruptcy Code. The illegality of this payment cannot be vitiated by the intermediate transfer of estate assets to the Government for the purpose of making payments that the Debtors otherwise are prohibited from making. It is undisputed that the payments are going to be made, that the payments are going to be funded with the Debtors' assets, and that the recipients of those payments are prohibited by the Bankruptcy Code from receiving such payments directly from the Debtors. Thus, the Settlement impermissibly attempts to accomplish indirectly what the Bankruptcy Code prohibits. *See Virginia Elec. & Power Co. v. Caldor, Inc.*, 117 F.3d 646, 650 (2d Cir. 1997) (" '[I]n bankruptcy proceedings substance should not give way to form . . . .' ") (quoting *In re Fin'l News Network Inc.*, 980 F.2d 165, 169 (2d Cir. 1992)); *In re PCH Assocs.*, 804 F.2d 193, 199 (2d Cir. 1986) (substance trumps form with respect to considerations of a lease under section 502(b)(6)).[15]

Had the Court of Appeals addressed the merits of Petitioners' appeal, it would have had to conclude that Petitioners are entitled to the relief they seek. By declining to address the merits, the Court of Appeals not only ignored its indisputable jurisdiction to enforce applicable law, but improperly elevated the equities relating to the discreet

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[15] Viewing the Restitution Fund as a claim by the Government—and not as claims of subordinated stockholders for whose benefit the fund is being established—does not change the result. Even if the DOJ could have obtained an order of forfeiture, the claim would be subordinated under 11 U.S.C. § 726(a)(4), which provides that any "fine, penalty or forfeiture" is subordinated to all other classes of claims, except claims for interest accruing during the case. *See* H.R. Rep. No. 95-595, at 383 (1977); S. Rep. No. 95-989, at 96-7 (1978) (Section 726(a)(4) ensures that innocent creditors are not punished along with the debtors by subordinating claims for forfeiture or penalties).

interests of a single purported stakeholder—the Government—over the greater equities of ensuring the equitable distribution of the Debtors' assets to *all* of the estates' stakeholders. Even accepting the Government's argument below (unsupported by the record) that its decision to settle depended on its right to distribute the funds in disregard of the Absolute Priority Rule, the equities of the Government's right to the benefit of an illegal bargain are greatly outweighed by the equities favoring the relief sought by Petitioners. Even assuming that the Second Circuit's standard for equitable mootness is the proper standard, it was error for the Second Circuit to avoid reaching the merits of Petitioners' appeal. Had the court addressed those merits under applicable Supreme Court and Second Circuit precedent, it would have determined not only that it could fashion the requested relief without upsetting the entire Settlement or reorganization plan, but that the equitable considerations so essential to the application of the doctrine of equitable mootness did not preclude it from granting such relief.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court issue writ of *certiorari* to review the judgment of the Court of Appeals for the Second Circuit.

Dated: May 29, 2007

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 06-1417-bk Lead, 06-1738-bk XAP
December 26, 2006

IN RE ADELPHIA COMMUNICATIONS CORPORATION,

Debtor,

AD HOC ADELPHIA TRADE CLAIMS COMMITTEE, OFFICIAL COMMITTEE OF UNSECURED CREDITORS, W.R. HUFF ASSET MANAGEMENT CO., LLC, U.S. NATIONAL BANK ASSOCIATION AS INDENTURE TRUSTEE,

Appellants,

—v.—

ADELPHIA COMMUNICATIONS CORPORATION,

Debtor-Appellee,

BANK OF AMERICA, N.A., BANK OF MONTREAL, WACHOVIA BANK, NATIONAL ASSOCIATION,

Appellees,

OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS,

Appellee-Cross-Appellant.[1]

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[1] The clerk of the court is requested to amend the official caption accordingly.

Appeal from the United States District Court for the Southern District of New York (Kaplan, J.).

Jonathan E. Minsker, Kasowitz, Benson, Torres & Friedman LLP, New York, NY, for Appellants-Cross-Appellees.

Eric B. Fisher, Morgenstern, Jacobs & Blue LLP, New York, NY, for Appellee-Cross-Appellant.

Brian E. O'Connor, Willkie Farr & Gallagher, LLP, New York, NY, for Debtor-Appellee.

Judith Elkin, Hayes & Boone LLP, New York, NY, for Appellees.

Barbara A. Ward, Assistant United States Attorney for Michael J. Garcia, United States Attorney for the Southern District of New York, New York, NY, for Amicus Curiae the U.S. Department of Justice.

Present ROSEMARY S. POOLER, ROBERT A. KATZMANN, BARRINGTON D. PARKER, Circuit Judges.

SUMMARY ORDER

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the appeal from the judgment of said District Court be and it hereby is DISMISSED.

Appellants challenge an order of the District Court, which held that the Bankruptcy Court had committed no

manifest error or abuse of discretion when approving settlements related to the estate of debtor-appellee Adelphia Communications Corporation ("Adelphia").[2] Debtor-appellee and appellees move pursuant to Rule 27 of the Federal Rules of Appellate Procedure to dismiss the appeal as equitably moot, or in the alternative, because the appeal constitutes an impermissible collateral challenge to a bankruptcy court's sale order. *See* 11 U.S.C. § 363(m). We assume the parties' familiarity with the facts, procedural history and specification of issues on appeal.

Adelphia and appellees correctly argue that the circumstances surrounding this appeal have changed comprehensively during the pendency of this appeal. *See In re Chateaugay Corp.*, 988 F.2d 322, 325 (2d Cir.1993). Additionally, the amici curiae Securities and Exchange Commission (the "SEC") and the U.S. Department of Justice (the "DoJ," collectively, the "government") point to the fact that the government declined to pursue massive civil fines and forebore mandatory forfeiture and even the criminal indictment of parties and non-parties to this case, in order to obtain settlements that would facilitate the creation of a victim restitution fund to compensate defrauded investors.

Appellants did not seek a stay before the government substantially performed its settlement obligations and the transfer and subsequent sale of the RMEs, which created comprehensively changed circumstances. Since they did not pursue with diligence all available remedies to

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[2] Appellee-cross-appellant challenges only the affirmance of that portion of the 9019 order reaffirming the existence of liens in property transferred to the Debtor during the pendency of the bankruptcy proceedings. This cross-appeal will be decided in a summary order issued simultaneously with this summary order.

seek a stay of execution to the objectionable 9019 order, they must demonstrate that the relief they seek would not create inequitable results. *See In re Chateaugay Corp.*, 10 F.3d 944, 949-50 (2d Cir.1993). They have made no such showing.

The DoJ and the SEC argue convincingly that the form of relief the appellants request would deny them-and only them-the benefits of their bargains in the four interrelated settlements approved by the 9019 order at issue. This would be grossly inequitable, given what the government bargained away to obtain. Appellants' argument that the government bargained only to obtain exclusive control of the victim restitution fund in the event that no court found it to be in conflict with the creditor priorities of the bankruptcy code is meritless. The phrase in the settlement that indicated that the creation of the fund is "subject to an applicable court approval process" clearly referred to Judge Sand's pending decision about whether to accede to the government's request, pursuant to the settlement, to forebear mandatory forfeiture.

Appellants ask this court to give them the benefit of the doubt on the issue of equitable mootness so that we might reach the merits of this appeal. They allege that the issue of equitable mootness is a close one, and that the appeal would be decided in their favor should we reach the merits. We disagree. The relief requested by appellants would be inequitable as a consequence of their failure to seek a stay, which created comprehensively changed circumstances.[3]

We therefore dismiss the appeal.

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[3] Any other form of relief, i.e., rescission of the agreements, would constitute an impermissible collateral challenge of the 363 orders. *See* 11 U.S.C. § 363(m); *United States v. Salerno*, 932 F.2d 117, 123 (2d Cir.1991).

[LETTERHEAD OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT]

Date:	February 27, 2007
Docket Number:	06-1417-bk
Short Title:	In Re: Adelphia Communications Corp. v.
DC Docket Number:	05-cv-5707
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Lewis Kaplan

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 27th day of February two thousand seven.

In re: Adelphia Communications

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Ad Hoc Adelphia Trade Claims Committee, Official Committee of Unsecured Creditors, W.R. Huff Asset Management Co., LLC, U.S. Bank National Association as Indenture Trustee, Official Committee of Equity Security Holders of Adelphia Communications Corp.. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Thomas Asreen, Acting Clerk

By: /s/ Tracy W. Young
Motion Staff Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 05 Civ. 5707(LAK)*
February 23, 2006

AD HOC ADELPHIA TRADE CLAIMS COMMITTEE,

Appellant,

—v.—

ADELPHIA COMMUNICATIONS CORP., *et al.*,

Appellees.

Edward S. Weisfelner, Brown Rudnick Berlack Israels, LLP (N.Y.C.), New York, NY, Official Committee of Unsecured Creditor of Adelphia Communications Corp., U.S. Bank National Association, as Indenture Trustee (Arahova), for Appellant.

Marc Ronald Abrams, Terence Kevin McLaughlin, Willkie Farr & Gallagher LLP (N.Y.), New York, NY, for Appellees.

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* The additional consolidated cases are 05 Civ. 5708, 05 Civ. 6161, 05 Civ. 6388, 05 Civ. 6692, and 05 Civ. 6862.

MEMORANDUM AND ORDER

KAPLAN, District Judge.

These are appeals from orders of the Bankruptcy Court approving three related settlement agreements relating to the Adelphia Communications scandal and adhering to that decision on reconsideration. One of the appellees cross-appeals from so much of the order approving the settlement agreements as authorized the debtors to grant to certain banks liens in entities that allegedly should be conveyed to the debtors free and clear of all liens.

The Appeals

In March 2002, Adelphia Communications Corp. ("Adelphia"), a company dominated by the Rigas family, disclosed that it was jointly and severally liable for more than $2 billion of borrowings attributed to certain entities owned by the Rigas interests but managed by Adelphia (the "RMEs") and that these liabilities were not reflected on Adelphia's consolidated balance sheets. It appeared also that part of those borrowings had been advanced to various Rigas family entities.

These disclosures set in motion a series of events disastrous for Adelphia, including the withdrawal of its auditors' opinion on its financial statements, defaults on credit facilities, delisting of its stock, governmental investigations, and a Chapter 11 filing by the company. The Securities and Exchange Commission ("SEC") sued the company and filed a proof of claim in the bankruptcy for, among other things, penalties, disgorgement, and prejudgment interest, which the SEC staff has indicated could amount to several billions of dollars. The risk of indictment hung over Adelphia. John and Timothy Rigas

ultimately were indicted and convicted in this Court of conspiracy and mail and bank fraud.

After protracted negotiations, Adelphia reached three interrelated settlement agreements with the Department of Justice ("DOJ"), the SEC, and the Rigases, the terms of which are summarized aptly in the opinion below and need not be repeated here save to note that principal terms included (1) the forfeiture by the Rigas family to the government of their interests in all but two of the RMEs followed by the government's conveyance of the forfeited entities to the company, (2) a contribution by Adelphia of $715 million to a government-established restitution fund for the purpose of providing restitution to persons who held publicly-traded securities of Adelphia that, in the government's determination, were victims of the fraud alleged in the Rigas indictment, (3) resolution of the SEC complaint by a consent injunction without payment by Adelphia of any disgorgement or civil penalty, and (4) agreement by the DOJ not to indict the company.

The appellants here, all unsecured creditors, were and remain deeply upset by the proposed settlement because its effect would be to allow equity holders to recover from the government-established restitution fund and thus to be paid ahead of them. They argued below primarily that the settlements were not in the best interests of the estate or fair, reasonable, and adequate, and that they violate the absolute priority rule.

In a comprehensive and able opinion,[1] Bankruptcy Judge Robert E. Gerber rejected these and other arguments and approved the settlements. He adhered to that

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[1] *In re Adelphia Comm. Corp.*, 327 B.R. 143 (Bankr.S.D.N.Y.2005).

ruling on reconsideration.[2] Having carefully considered the briefs and heard oral argument, I reject appellants' contentions, substantially for the reasons given by Judge Gerber. I write only to make a few additional observations.

First, at the core of appellants' argument are the related contentions that the government coerced the company into the settlements by the threat of indictment and that the court below failed to determine whether the government was bluffing.

The coercion argument is baseless. As Judge Gerber correctly noted, "where . . . 'coercion' results from differences in bargaining power, as a consequence of law or fact, or governmentally granted authority and discretion (such as the authority and discretion we grant to prosecutors, to achieve a common good), that is a wholly different kind of 'coercion.' As one of the banks' counsel aptly noted in argument on this motion, it is what we call 'leverage.' "[3] What the appellants characterize as coercion was no different in principle than the pressure that leads the overwhelming majority of defendants in criminal cases to plead guilty-the risk that a conviction after trial will result in a harsher sentence than is likely to be imposed following a guilty plea. Yet guilty pleas in such circumstances rightly are considered voluntary and uncoerced in any relevant sense. In *United States v. Baum*,[4] for example, this Court found that a guilty plea was voluntary and uncoerced despite a claim that the defendant felt impelled to plead by the imminence of the

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[2] *Id.*, 327 B.R. 175 (Bankr.S.D.N.Y.2005).

[3] 327 B.R. at 166.

[4] 380 F.Supp.2d 187 (S.D.N.Y.), *aff'd*, 139 Fed.Appx. 366 (2d Cir.2005).

trial and her alleged feeling that her counsel was not fully prepared. I wrote:

> "[I]t must be borne in mind that the issue of coercion in this context is not a purely subjective one. 'When a guilty plea is challenged as being the product of coercion, our concern is not solely with the subjective state of mind of the defendant, but also with the constitutional acceptability of the external forces inducing the guilty plea.'[5] So, for example, 'a State may encourage a guilty plea by offering substantial benefits in return for the plea,' including 'the possibility or certainty not only of a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty, but also of a lesser penalty than that *required* to be imposed after a guilty verdict by a jury.'[6] Such offers often present defendants with choices among unpleasant alternatives. But the fact that a plea of guilty is the most attractive option for the defendant from a subjective point of view does not render its offer constitutionally coercive. In other words, regardless of a defendant's subjective state of mind, the Constitution does not make the pressure generated by such entirely appropriate facets of the criminal process inappropriate."[7]

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[5] *Iaea v. Sunn*, 800 F.2d 861, 866 (9th Cir.1986); *cf. Miller v. Fenton*, 474 U.S. 104, 115-16, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985) ("Although sometimes framed as an issue of 'psychological fact,' the dispositive question of the voluntariness of a confession has always had a uniquely legal dimension.").

[6] *Corbitt v. New Jersey*, 439 U.S. 212, 219-20, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978) (internal quotation marks and citations omitted).

[7] *Baum*, 380 F.Supp.2d at 210.

So too here. The government encouraged Adelphia to enter into the settlements by offering substantial benefits—including the elimination of the threat of criminal prosecution and of any SEC claim for disgorgement and civil penalties—in exchange for its agreement to the settlements. While the alternatives presented all were unpleasant, that does not render the situation coercive in any legally relevant sense. If, as is the case, a defendant constitutionally may be induced to plead guilty to a crime carrying a prison sentence by a threat that a trial could result in imposition of a death penalty,[8] surely Adelphia could pay $715 million to avoid indictment, with all its disastrous consequences, and a $5 billion disgorgement and penalty claim by the SEC.

The contention that the court below did not inquire into whether the government was bluffing in threatening to indict the company is, if anything, less meritorious. The record before Judge Gerber overwhelmingly demonstrated that the government explicitly threatened indictment and took an exceptionally "hard-nosed" position with respect to the amount that Adelphia would be required to pay in order to avoid that fate. That evidence was more than sufficient to justify Judge Gerber's findings that the risks that Adelphia faced were "of extraordinary magnitude"[9] and that there was "a 'real risk' of a criminal indictment . . . that would have [had] disastrous consequences to this reorganization."[10] Certainly there was no clear error.

Finally, appellants object strenuously to the settlements on the ground that the government is likely to dis-

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[8] *E.g.*, *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

[9] 327 B.R. at 160.

[10] *Id.*

tribute the victim restitution fund in part to equity security holders who could not take ahead of the appellants in a plan of reorganization in light of the absolute priority rule. Their premise is correct, as the court below recognized. The conclusion, however, does not follow. As Judge Gerber held, any payments from the restitution fund would be from "a fund to be created and owned by the Government," not a distribution of assets of the debtors' estates as part of a plan of reorganization.[11] They therefore would not come within the language of Sections 510(b) and 1129 of the Code.[12] Moreover, it is worth noting that if Adelphia had rejected the government's proposal and the government succeeded in forfeiting its assets, the government's interest in the assets would have been superior to those of the creditors in any case.

Appellants' unhappiness at the idea of a substantial distribution of assets that originated in the estate to equity holders who would have been subordinate to them had the assets been distributed as part of a plan of reorganization is entirely understandable. The proper focus for any complaint, however, is Congress, which alone is empowered to alter the terms of the Code to achieve the end that appellants desire.

The Cross-Appeal

Despite joining the debtors in supporting the settlements generally, the Official Committee of Equity Security Holders of Adelphia (the "Equity Committee") cross-appeals as to the Bankruptcy Court's approval of that part of the deal that preserved certain banks' pre-

[11] *Id.* at 169.

[12] U.S.C. §§ 510(b), 1129.

petition liens on the equity interests in the RMEs. Although the Equity Committee contends that the Bankruptcy Court did not hear from the interested parties or consider the issue properly before approving the preservation of the liens, the opinion demonstrates otherwise.[13] The decision to preserve the pre-petition liens as part of the approval of the Settlement was well within the Bankruptcy Court's discretion.

Conclusion

For the foregoing reasons, the orders appealed from are affirmed in all respects.

SO ORDERED.

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[13] *See, e.g.*, 327 B.R. at 154, 168, 173.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02-41729 (REG)
May 20, 2005

IN RE ADELPHIA COMMUNICATIONS CORP., *et al.*,

Debtors.

Willkie Farr & Gallagher LLP, by Marc Abrams, Esq. (argued), Paul V. Shalhoub, Esq., Brian E. O'Connor, Esq., Terence K. McLaughlin, Esq., Rachel C. Strickland, Esq., Morris J. Massel, Esq., Jamie M. Ketten, Esq., New York, NY, Boies, Schiller & Flexner LLP by Philip C. Korologos, Esq. (argued), George Carpinello, Esq., Eric Brenner, Esq., Armonk, NY, Covington & Burling by Alan Vinegrad, Esq., New York, NY, Foley & Lardner LLP, by Gregory S. Bruch, Esq., Washington, D.C., for Debtors and Debtors in Possession.

David N. Kelley, United States Attorney, by Richard D. Owens, Assistant United States Attorney, Christopher J. Clark, Assistant United States Attorney (argued), Judd C. Lawler, Assistant United States Attorney, New York, NY.

Dilworth Paxson LLP, by Lawrence G. McMichael, Esq. (argued), Martin J. Weis, Esq., Philadelphia, PA, Brown, Raysman, Millstein, Felder & Steiner LLP, by

Gerard S. Catalanello, Esq., Shannon R. Wing, Esq., New York, NY, for the Rigases.

Kasowitz, Benson, Torres & Friedman LLP, by David M. Friedman, Esq. (argued), Adam L. Shiff, Esq., Jonathan E. Minsker, Esq., New York, NY, for the Official Committee of Unsecured Creditors.

Bragar, Wexler, Eagel & Morgenstern, P.C., by Peter D. Morgenstern, Esq. (argued), Gregory A. Blue, Esq., Eric B. Fisher, Esq., Andrew Buck, Esq., New York, NY, for the Official Committee of Equity Security Holders.

Hennigan, Bennett & Dorman LLP, by Bruce Bennett, Esq. (argued), James O. Johnston, Esq., Los Angeles, CA, by A. Brent Truitt, Esq., New York, NY, for the Ad Hoc Committee of ACC Senior Noteholders.

Seward & Kissel LLP, by Arlene R. Alves, Esq., New York, NY, for Law Debenture Trust Company of New York, as ACC Senior Notes Trustee.

Brown, Rudnick, Berlack, Israels LLP, by Edward S. Weisfelner, Esq., New York, NY, by Steven D. Pohl, Esq. (argued), Boston, MA, for the Ad Hoc Adelphia Trade Claims Committee.

White & Case LLP, by J. Christopher Shore, Esq. (argued), Douglas P. Baumstein, Esq., New York, NY, by Thomas E. Lauria, Esq., John K. Cunningham, Esq., Gerard Uzzi, Esq., Miami, FL, for the Ad Hoc Committee of Arahova Noteholders.

Andrews Kurth LLP, by Peter S. Goodman, Esq. (argued), Justin R. Wyatt, Esq., New York, NY, by Hugh M. Ray, Esq., Houston, TX, for the Ad Hoc Committee of Senior Preferred Shareholders.

Fried, Frank, Harris, Shriver & Jacobson LLP, by Gregg L. Weiner, Esq., Gary Kaplan, Esq. (argued),

Craig M. Price, Esq., New York, NY, for W.R. Huff Asset Management Co., L.L.C.

Sheppard, Mullin, Richter & Hampton LLP, by David McCarty, Esq., Los Angeles, CA, for U.S. Bank National Association, as Indenture Trustee in Respect of the Arahova Notes and the FrontierVision Notes.

Chapman and Cutler LLP, by James E. Spiotto, Esq., Ann Acker, Esq., Chicago, IL, for the Certain FrontierVision Noteholders.

Emmet, Marvin & Martin, LLP, by Edward P. Zujkowski, Esq., Martin Eisenberg, Esq., New York, NY, for The Bank of New York, as Indenture Trustee.

Haynes and Boone, LLP, by Judith Elkin, Esq., Glenn M. Kurtz, Esq., Karen M. Asner, Esq., New York, NY, by Thomas E. Kurth, Esq., Robin E. Phelan, Esq. (argued), Richard Anigian, Esq., Dallas, TX, for Bank of America, N.A.

Mayer, Brown, Rowe & Maw LLP, by J. Robert Stoll, Esq., Robert J. Ward, Esq., Kenneth E. Noble, Esq. (argued), New York, NY, for Bank of Montreal, as Administrative Agent for the Olympus Lenders.

Simpson, Thacher & Bartlett LLP, by Peter Pantaleo, Esq. (argued), William T. Russell, Jr., Esq. (argued), New York, NY, for Wachovia Bank, N.A., as Administrative Agent for the UCA Lenders.

Milbank, Tweed, Hadley & McCloy LLP, by Luc A. Despins, Esq., New York, NY, for Citibank, N.A., as Administrative Agent for the Century-TCI Lenders.

Milbank, Tweed, Hadley & McCloy LLP, by James C. Tecce, Esq., New York, NY, for JPMorgan Chase Bank, as Administrative Agent for the FrontierVision Lenders.

Luskin, Stern & Eisler LLP, by Michael Luskin, Esq., Trevor Hoffmann, Esq., New York, NY, for The Bank of Nova Scotia.

Cleary Gottlieb Steen & Hamilton LLP, by Mitchell A. Lowenthal, Esq. (argued), New York, NY, for 13 Investment Banks.

Chadbourne & Parke LLP, by Andrew P. Brozman, Esq., New York, NY, for Credit Lyonnais New York Branch, Credit Lyonnais Securities (USA) Inc., and LCM I Limited Partnership.

Ballard, Spahr, Andrews & Ingersoll, LLP, by William Slaughter, Esq. (argued), Philadelphia, PA, for Comcast.

Morgan, Lewis & Bockius LLP, by Richard S. Toder, Esq. (argued), Neil E. Herman, Esq., New York, NY, for Century/ML Cable Venture.

Proskauer Rose LLP, by Bradley I. Ruskin, Esq. (argued), Jeffrey Levitan, Esq., Scott A. Eggers, Esq., Karen Coombs, Esq., New York, NY, for ML Media Partners, L.P.

Angel & Frankel, P.C., by Joshua J. Angel, Esq., Laurence May, Esq. (argued), John H. Drucker, Esq. (argued), Leonard H. Gerson, Esq., Kirby McInerney & Squire LLP, by Richard L. Stone, Esq., Mark A. Strauss, Esq., Abbey Gardy, LLP, by Arthur N. Abbey, Esq., Judith L. Spanier, Esq., Stephen T. Rodd, Esq., Richard B. Margolies, Esq., New York, NY, for Consolidated Class Action Plaintiffs.

Rutan & Tucker, LLP, by William M. Marticorena, Esq., Costa Mesa, CA, for the County of San Diego, California.

Miller & Van Eaton, LLP, by Kenneth A. Brunetti, Esq., San Francisco, CA, by William Malone, Esq., Washington, D.C., for the City of Carlsbad, California.

BENCH DECISION ON MOTION TO APPROVE SETTLEMENT AGREEMENTS

ROBERT E. GERBER, Bankruptcy Judge.

In this contested matter in the jointly administered chapter 11 cases of Adelphia Communications Corporation and its subsidiaries (the "Debtors"), Adelphia moves for authorization to enter into three related agreements, collectively embodying a four-way settlement with the United States Department of Justice, the Securities and Exchange Commission, and members of the family of John Rigas, Adelphia's founder and former CEO. The settlement addresses, among other things, the DoJ's ability to indict Adelphia itself, the SEC's action and proof of claim against Adelphia, and Adelphia's presently pending adversary proceeding against the Rigases. The motion has engendered a considerable number of objections, principally by unsecured creditors, who express the concern, probably with some justification, that a victims restitution fund that the DoJ and SEC will establish with settlement proceeds will go in major part to equity holder victims of Adelphia fraud, whose recoveries in this Court would be subordinate to creditors under normal bankruptcy priorities.

The motion requires the Court to consider whether the settlement is in the best interests of the estate and is fair and equitable. It also requires the Court to consider whether the settlement inappropriately prejudices the substantive rights of any stakeholder.

After considering the parties' written and oral arguments, and the evidence at an evidentiary hearing, I conclude that the settlement is in the best interests of the estate and fair and equitable. I further conclude that while the estate's contractual arrangements with the counterparties to its settlement agreements should be approved (and without any change), certain internal measures, within these chapter 11 cases, are appropriate to avoid undue prejudice to creditors as a consequence of the settlement, which I should establish within the approval order.

Accordingly, the settlement is approved, with certain additional measures being included within my approval order to protect rights following the implementation of the settlement. The following are my Findings of Fact, Conclusions of Law, and bases for the exercise of my discretion in connection with this decision.

Findings of Fact

Under my Case Management Order # 3, factual assertions in motions in contested matters are taken as true unless controverted. Under that order as well, direct testimony is taken by affidavit, and cross-examination and any subsequent testimony is taken live. After reviewing the direct testimony affidavits and designated deposition testimony (cross-examination having been waived) of Adelphia's witnesses, Lead Director Anthony Kronman and Covington & Burling lawyer Alan Vinegrad, I find their testimony—by affidavit and in their depositions—wholly credible, and I accept it in full. Without getting into all of the detail that characterizes the record on this motion, I summarize my factual findings, and my conclusions based upon them, below.

A. Background

Just as Adelphia owns numerous cable companies, so do the Rigases personally, through business entities ("Rigas Family Entities")—corporations, general partnerships, limited partnerships, and limited liability companies—that own cable properties that generate substantial revenues, and are not debtors before this or any other court. About 16 of the Rigas Family Entities, operating 11 cable systems, are currently managed by Adelphia on a day-to-day basis; they are referred to as the "Managed Entities."

In March 2002, Adelphia disclosed that it was jointly and severally liable for more than $2 billion of borrowings attributed to certain of the Managed Entities under credit facilities (the "Co-Borrowing Facilities") that were not reflected as debt on Adelphia's consolidated financial statements. It also appeared that a portion of the borrowings for which Adelphia entities were jointly and severally liable had been advanced to various Rigas Family Entities to finance purchases of Adelphia securities.

In the aftermath of this disclosure, the stock of ACC was delisted from the NASDAQ National Market; Deloitte & Touche LLP ("Deloitte"), the Debtors' independent auditor at that time, suspended its auditing work on Adelphia's consolidated financial statements for the year ended December 31, 2001 and withdrew its opinion for prior consolidated financial statements; and Adelphia and its subsidiaries ultimately defaulted under various credit facilities, notes and preferred stock.

In addition, a special committee of ACC's Board of Directors (the "Board"), composed solely of three members of the Board who were not members of the Rigas Family, commenced a formal investigation into related party transactions between Adelphia entities and mem-

bers and Rigas Family Entities. This investigation led to the public disclosure of previously undisclosed information about the Rigas Family's co-borrowing activities, related party transactions, and involvement in accounting irregularities. In May 2002, the Rigases resigned their positions as officers and directors of Adelphia.

With no access to traditional sources of liquidity in the capital markets, pending governmental agency investigations, mounting litigation, default notifications under various credit instruments, and the resulting risk of collection and foreclosure actions by creditors, the Debtors filed for chapter 11 protection in June 2002.

B. Government Actions

After the disclosure of the improprieties, the DoJ and the SEC (collectively, the "Government") also initiated significant actions against, or investigations of, the Rigases, Adelphia as an entity, and others. This included criminal prosecutions and related forfeiture proceedings in the district court, initiated by the DoJ, and a civil action in the district court and proof of claim in this Court by the SEC.

(1) The Criminal Prosecutions

Following Government investigation of the matters described in part above, John, Timothy and Michael Rigas were indicted for numerous alleged violations of federal law. Although none of the Debtors were indicted, at no point did the DoJ rule out such a possibility—although the Debtors requested as early as the Summer of 2002 that the DoJ agree not to pursue an indictment of Adelphia. After a jury trial in the district court (Hon. Leonard Sand, U.S.D.J.), John and Timothy Rigas were convicted of conspiracy to commit fraud and several

counts of mail fraud and bank fraud. The jury acquitted Michael Rigas of some of the charges, but could not reach agreement with respect to others.

Since the time the Rigases themselves were indicted, the DoJ has considered whether, in addition to having indicted John, Timothy and Michael Rigas, it would indict Adelphia itself. In addition, the DoJ has advised Adelphia's counsel on several occasions that there is a "real risk" of an indictment of Adelphia. For example, when the Creditors' Committee announced its plan of reorganization term sheet in November 2004, which contained terms inconsistent with the Government's expectations, only the extensive efforts and assurances of the Debtors and their advisors avoided a possible indictment. More recently, the Debtors were threatened with indictment if they were unable to reach agreement on settlement terms with the DoJ and the Rigas Family by the previously scheduled sentencing date of April 18, 2005 for John and Timothy Rigas.

That was so even though Adelphia and its counsel provided the Government with very substantial cooperation in its investigation and prosecution of the Rigases.

Additionally, the DoJ has initiated proceedings to secure the criminal forfeiture of the Managed Entities, and has threatened Adelphia with the possibility of indicting such Managed Entities—matters of considerable concern to Adelphia, given Adelphia's own litigation against the Rigases, and Adelphia's own efforts to recover the Managed Entities in partial satisfaction of the losses Adelphia itself suffered under the Rigases' watch.

(2) The SEC Action

On July 24, 2002, the SEC filed a civil enforcement action (the "SEC Action") against ACC, certain mem-

bers of the Rigas Family and others, alleging securities fraud and improper books and records claims. On December 3, 2003, the SEC filed a proof of claim in this Court for, among other things, penalties, disgorgement and prejudgment interest in an unspecified amount based on the allegations in the SEC Action. The SEC staff has indicated that its asserted claims could amount to several billions of dollars of liabilities.

The SEC has informed Adelphia's advisors that, in the absence of a settlement, the SEC would seek hundreds of millions of dollars of civil penalties and the disgorgement from the Debtors of all funds raised through public offerings during the period that the Debtors' financial statements contained material misstatements and omissions. The amount of such funds (excluding the securities placed with the Rigases) is between approximately $5 billion and $6 billion.

In July 2004, the Creditors' Committee initiated an adversary proceeding against the SEC related to the SEC's proof of claim-seeking, among other things, to subordinate the SEC's claim to all of the claims and interests that are senior or equal to the claims and interests on whose behalf the SEC claim has been asserted. In that adversary proceeding, the Creditors' Committee made contentions very similar to those it makes here—that under bankruptcy law, claims of creditors must be satisfied before distributions to equity can be made, and that the SEC's claim must be subordinated under Bankruptcy Code section 510(b). I granted motions by the Equity Committee and the Unofficial Committee of Trade Claims holders to intervene. The SEC thereafter moved to dismiss the adversary proceeding on an asserted absence of a justiciable case or controversy, and the Creditors' Committee cross-moved for summary

judgment. The briefing as to those motions is still underway.

C. The Adelphia-Rigas Action

In July 2002, Adelphia commenced an adversary proceeding in this Court (the "Adelphia-Rigas Action") against the Rigases, other former Adelphia employees, and several Rigas Family Entities. Adelphia's adversary complaint generally alleged that the Rigases misappropriated billions of dollars from Adelphia in violation of their fiduciary duties. In November 2002, Adelphia filed an amended complaint against the defendants, expanding upon the facts alleged in its original complaint, and alleging state law claims for breach of fiduciary duty, fraudulent concealment, fraudulent misrepresentation, conversion, waste of corporate assets, breach of contract, unjust enrichment, fraudulent conveyance, constructive trust, inducing breach of fiduciary duty, and a request for an accounting, and federal claims under RICO and the Securities Exchange Act of 1934.

The Rigases moved to dismiss the amended complaint. I denied that motion insofar as it covered the common law claims, and took the portion of that motion that dealt with the RICO and 34 Act claims under advisement. With the agreement of the parties, that aspect of the decision was held in abeyance.

In August 2004, after John and Timothy Rigas were convicted, Adelphia moved for partial summary judgment against John, Timothy, Michael and James Rigas, and several Rigas Family Entities on the unjust enrichment and constructive trust counts of the amended complaint—seeking, among other relief, judgment in the amount of approximately $3.2 billion. That motion was fully briefed but oral argument on it was deferred in light of the proposed settlement.

D. Negotiation of the Settlement Agreements

Given the extraordinary challenges posed by the DoJ's indictment threats and the SEC claims, the Adelphia Board acted to ensure that Adelphia had retained outside counsel with preeminent experience to represent Adelphia's interests. Thus, in addition to Adelphia's existing litigation counsel, Boies, Schiller & Flexner, and its regular bankruptcy and corporate counsel, Willkie Farr & Gallagher, Adelphia also retained Alan Vinegrad of Covington & Burling ("C & B") as its principal white-collar defense counsel, and Gregory S. Bruch of Foley & Lardner as its principal SEC counsel. Mr. Vinegrad served as the United States Attorney for the Eastern District of New York and the Chief Assistant U.S. Attorney, Chief of the Criminal Division, Deputy Chief of the Criminal Division, Chief of Civil Rights Litigation, and Chief of General Crimes. Mr. Bruch spent 12 years with the SEC Division of Enforcement, where he served as assistant director.

Adelphia and the Board were also advised by Adelphia's General Counsel, Brad Sonnenberg, who joined Adelphia in July 2003. Mr. Sonnenberg served as an Assistant U.S. Attorney for the Department of Justice, where he prosecuted white collar crimes, and therefore also had substantial experience in these types of matters.

From the time the SEC Action was filed in July 2002, Adelphia's advisors engaged in ongoing discussions with the SEC and the DoJ about how Adelphia's issues with the Government might be resolved. I am intentionally not setting forth the specifics of Adelphia settlement proposals, or the substantial legal advice Adelphia obtained with respect to the settlement negotiations, but am including enough of the detail to document the substantial effort Adelphia made to negotiate the best set-

tlement possible, and the considerable care with which it engaged in the settlement process.

In these discussions, the SEC had proposed that the Debtors settle the SEC Action and resolve all outstanding issues with the DoJ for $1 billion, which the SEC said was 20% of its disgorgement claim. The Board was also informed that the DoJ—which was still in the midst of its criminal case against John, Timothy, and Michael Rigas—had not had a chance to formulate a view of the "right" settlement number.

Because any settlement necessarily would have to be a comprehensive one that included the DoJ, and because the DoJ indicated that it needed to complete its criminal trial of the Rigases before being able to evaluate, let alone negotiate, its position on a consensual resolution of Adelphia's criminal issues, formal settlement negotiations to resolve the Government Claims were not pursued while the DoJ's criminal case against the Rigases proceeded to trial. Nonetheless, as the criminal trial moved closer to completion, the Board, together with its advisors, discussed how to respond to the SEC's $1 billion settlement demand. In the meantime, Adelphia and its lawyers continued to provide extensive assistance to the DoJ in connection with the ongoing criminal trial.

In connection with a June 1, 2004 Board Meeting, the Board received information concerning selected recent SEC settlements in financial fraud and related cases and was advised of each case's relevance to the SEC's claims against Adelphia. The Board was also provided with a copy of an April 29, 2004 speech by Steve Cutler, the SEC's Director of Enforcement, which provided a structure for considering the appropriate measure of a civil penalty against Adelphia.

The Board was also provided with a quantitative analysis by Adelphia's financial advisors, Lazard Freres,

which compared the settlement in the *WorldCom* case, which had provided the SEC with $750 million in value as the distribution on an allowed claim of a face value of $2.25 billion, with the $1 billion dollar settlement figure mentioned by the SEC to Adelphia's advisors. The Board understood that the *WorldCom* settlement was likely to be viewed as a benchmark for any Adelphia settlement. Thus, the Lazard analysis sought to calculate a variety of possible Adelphia settlements based on a comparison of Adelphia to WorldCom using a number of potentially relevant metrics, such as market value, total distributable value, sales, and EBITDA.

Because the Lazard analysis showed that Adelphia, compared to WorldCom, had raised far more capital in the public markets during the alleged period of the fraud, this metric suggested that the $1 billion settlement demand was reasonable. But according to most of the metrics used in the Lazard analysis, a $1 billion settlement of the SEC Action seemed disproportionate to the $750 million settlement of the SEC's claims against WorldCom.

Accordingly, after considerable analysis and discussion, Adelphia's Board authorized the first of its several settlement proposals—a meaningful amount, but much less than the amount of the proposed settlement amount now. But after considering comments from Adelphia's Creditors' Committee, Adelphia changed, adversely to the Government, the size and currency of its settlement proposal, and Adelphia instead made a proposal in a lesser amount, and in the currency not of cash, but rather of common stock of a reorganized Adelphia.

But the SEC rejected this offer. After the conclusion of the Rigas criminal trial in early July 2004, the DoJ joined in supporting the $1 billion settlement figure proposed by the SEC, though it stated that such a settlement

would resolve both the DoJ's and SEC's claims. The Adelphia Board, now caught in a crossfire between the DoJ and the SEC, was informed that the Government indicated that it had two powerful weapons at its disposal—indictment and forfeiture—and that the Government would consider using them if Adelphia was unwilling to pay $1 billion towards compensation for the victims of the crimes committed by convicted members of the Rigas management. In support of its $1 billion demand, the Government cited, among other things, its view that $1 billion was the approximate value of the Managed Entities that the Government intended to seize in full or partial satisfaction of the approximately $2.5 billion forfeiture obligations of John and Timothy Rigas.

Adelphia and its Board faced these challenges even though C & B had made a presentation to the Government in November 2004 regarding the so called "Thompson" factors—factors federal prosecutors are to consider following in deciding whether to seek criminal charges against a corporation. These factors, which are publicly available, were argued by C & B, as they are argued by objectors here, to tilt—materially—in favor of a decision *not* to indict.

But the Government expressed a different view. It asserted that the "Thompson" factors, as applied to Adelphia, were essentially in equipoise and that, in the Government's view, the amount of restitution to be paid to victims was the "swing" issue that would decide whether the balance would tip in favor of, or against, indictment. The Government expressed the view that Adelphia's initial offer was inadequate to tip the balance against indictment and that there was therefore a "real risk" that Adelphia would be indicted in the absence of meeting the Government's $1 billion demand.

As the discussions continued, Adelphia's management, Board and advisors came to believe (and I believe reasonably so) that the Government's very tough and resistant position in the settlement negotiations was based upon an estimate of what the Government believed it had the power to do to the Debtors, and what costs the Government could impose upon the Debtors by exercising those powers. The magnitude of those costs appeared to be the crucial determinant in arriving at the settlement figure on which the Government insisted in the negotiations. And given the powers the Government had, and its very credible threat to exercise them with devastating consequences, Adelphia's Board felt (once more, reasonably, in my view) that it had no practical alternative other than to acknowledge the reality of the very tough spot Adelphia found itself in. The Board therefore began to view potential settlement offers against the benchmark of whether (notwithstanding the precedents) the cost of settlement was outweighed by the harm that settlement avoided—by insuring that the Government did not exercise its powers in the way the Government was threatening. In other words, the focus evolved from a review of "comparables" in similar settlements to a more self-introspective analysis of the situation Adelphia was in, and the damage to Adelphia that could result if Adelphia were indicted.

As a result, with a unanimous vote, the Adelphia Board authorized a second, higher, offer (partly in litigation trust certificates and partly in stock) that had been recommended by the Company's advisors. This offer was communicated to the Government in December 2004. As with Adelphia's prior offer, this second offer was contingent on Adelphia obtaining title to the Managed Entities.

But the DOJ responded to the second offer by reaffirming its $1 billion proposal, noting that the Debtors' proposal (even at this higher number) was "just this side of insulting."

As part of the preparation for a Board meeting to be held on February 10, 2005, the four law firms advising Adelphia's Board prepared and delivered a detailed joint memorandum—25 pages in length, single spaced—that reviewed (i) the risks posed by the Government's claims, (ii) the status of the settlement negotiations between Adelphia's advisors and the Government, and (iii) the approval process that would be required for a settlement of the Government Claims and the legal framework the Board should use to determine whether to enter into such a settlement. I have reviewed this memorandum, but consider it unnecessary and inappropriate to discuss it in detail here—particularly in light of the possibility that any decision on my part approving the settlement might be overturned on appeal. It is sufficient for purposes of this discussion to say that the memorandum was thorough and thoughtful, and that it very ably counseled the Board on the strengths and weaknesses of Adelphia's position, and the risks Adelphia faced.

Ultimately, after lengthy consideration and debate, the Adelphia Board concluded that Adelphia was likely to lose more if it did not go forward with a settlement on terms much closer to what the Government had been demanding for months. The Board discussed the fact that the Government fully appeared to intend to take the Managed Entities by forfeiture if a settlement was not promptly reached. I find that this conclusion was, at the least, reasonable. While the Adelphia Board had been informed that Adelphia had arguments it could make against forfeiture, it was told that Adelphia's prospects of prevailing were uncertain at best, and there was thus

a very real risk that these arguments would be unavailing and forfeiture would deprive the estate of assets worth between $800 million to $1 billion. Even worse, the Board had come to believe that the Government would demand, on threat of indictment, that Adelphia make up the difference if the Managed Entities lost value in the Government's hands, as was almost certain, since the Government would not have the expertise or the resources to operate cable companies.

Thus, Adelphia faced a "double hit" of losing the Managed Entities and being forced to compensate for the loss of value of the Managed Entities in the Government's hands. With those factors, among others, in mind, the Adelphia Board considered a third proposal to the Government, at a still higher amount, at its meeting of February 10. While the third offer the Board was considering was now quite large, the Board believed that it would still save Adelphia, at minimum, hundreds of millions of dollars in this extremely plausible scenario. It would also eliminate once and for all the still very real risk of an indictment that would have had catastrophic consequences for the Debtors.

In considering the third proposal, the Board considered concerns voiced by the Creditors' Committee, and by a major unsecured creditor, W.R. Huff. The Creditors' Committee took the position, among others, that any settlement should be funded by value that would otherwise be provided to the holders of bank claims, and that if Adelphia came to a settlement inconsistent with that position, the Creditors' Committee would object to any settlement. Huff took the position that the Adelphia directors would be breaching their fiduciary duties to Adelphia if they authorized the offer that the Board's advisors had recommended.

The Board concluded that there was no way to reconcile the Creditors' Committee position with the reality of the negotiations with the Government. I agree. Also, there was no way to reconcile the Creditors' Committee position with the requirements of due process. As discussed more fully below, it may turn out to be, after full opportunity for all parties to put on evidence and be heard, that co-borrowing banks, or others, should bear financial responsibility for the damage Adelphia suffered. But this was not the appropriate time, or manner, to do that. And at the risk of stating the obvious, a decision to charge the banks would be one for me or a higher court to make, and not an appropriate one to be made as part of a deal between Adelphia and the Government, in which the banks would have no opportunity to present their defenses or otherwise be heard.

Similarly, I cannot agree that by making a settlement proposal at the level of the third offer (or, for that matter, at higher levels, up to the level of the proposal that is the subject of this motion), the Board would, or did, breach its fiduciary duty. To the contrary, I find exactly the opposite. While as discussed more fully below, the propriety of a settlement is gauged by a standard more demanding than the business judgment rule (which more demanding standard, as discussed below, I find likewise to have been satisfied), the Board's conduct more than amply satisfied all of the requirements of the business judgment rule.[1] The Board's business decision was made with disinterestedness and in good faith, and with much

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[1] In four published decisions, and countless unpublished ones, I have noted the standards applicable to an exercise of business judgment in this Circuit and district, most notably as articulated by Chief Judge Mukasey of this district in *Official Comm. of Subordinated*

more than due care—indeed with painstaking care, after considering the views of skilled advisors and the stakeholders in this case, and with an appropriate consideration of the good of the enterprise as a whole. My review ensures that there was no abuse of discretion on the part of the Board, or waste of corporate assets. Any suggestion that the Board's actions were a breach of fiduciary duty would be frivolous.

Adelphia's third offer to the Government was not accepted, but it elicited a counteroffer of $750 million. Subsequent efforts by Adelphia's counsel were successful in getting the Government to move down to $725 million, but the Government refused any further reductions. At about this time, the Government expressed the desire to include, as part of any settlement with Adelphia, a resolution of the Government's claims against the Rigases and of Adelphia's claims against the Rigases. The Government also told Adelphia that it would permit the Rigases to keep approximately $90 million in property (including 23,000 of their approximately 227,000

Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.), 147 B.R. 650 (S.D.N.Y.1992) (Mukasey, C.J.) ("*Integrated Resources*").

As described in *Integrated Resources:*

> The business judgment rule's presumption shields corporate decision-makers and their decisions from judicial second-guessing when the following elements are present: "(1) a business decision, (2) disinterestedness, (3) due care, (4) good faith, and (5) according to some courts and commentators, no abuse of discretion or waste of corporate assets."

Id. at 656. *See also In re Global Crossing Ltd.*, 295 B.R. 726, 743 (Bankr.S.D.N.Y.2003); *In re Adelphia Communications Corp.*, 2003 WL 22316543, at *30-*31 (Bankr.S.D.N.Y. Mar.4, 2003); *In re Adelphia Communications Corp.*, 2004 WL 1634538, at *2 (Bankr.S.D.N.Y. June 22, 2004); *Adelphia Communications Corp. v. Rigas (In re Adelphia Communications Corp.)*, 323 B.R. 345, 390-92 (Bankr.S.D.N.Y. Mar.24, 2005).

cable subscribers), and that the Government not only would permit this, but wanted this—even though Adelphia was opposed to it.

On February 28, 2005, Adelphia CEO William Schleyer and Lead Director Anthony Kronman, the former Dean of the Yale Law School, met with David Kelley, the United States Attorney for the Southern District of New York, to see if their personal involvement could help bridge the gap between Adelphia's third offer and the Government's $725 million demand. Mr. Schleyer and Dean Kronman once more tried to make the points that Adelphia's lawyers had made before, but Mr. Kelley was not moved by those arguments. He stated that the Government believed it would win any forfeiture litigation, and was prepared to face whatever risks might exist regardless—including the risk that whatever assets the Government might take would be worth much less in its hands than in the hands of a cable operator. Dean Kronman also made the point that Adelphia's creditors make here—that providing value to shareholder victims would be inconsistent with the "absolute priority rule" in bankruptcy. Mr. Kelley was once more unmoved, observing that Adelphia's creditors knew or should have known, at the time of their investments, that the absolute priority rule could be trumped by the Government's power to seek restitution for victims.

At some point at about this time, the Government signaled that it would alternatively take $695 million if all of that was in cash, but Adelphia properly reasoned that this would be much less attractive for its estate than a settlement that provided the Government with as much of its value as possible in stock, interests in a litigation trust, or another alternative currency.

Given the circumstances with which it was faced, Adelphia's Board authorized acceptance of the Gov-

ernment's $725 million counteroffer. Because the Rigases were permitted by the Government to keep two of their cable companies, Bucktail Broadcasting Corp ("Bucktail Broadcasting") and Coudersport Television Cable Co. ("Coudersport Cable"), Adelphia was ultimately successful in reducing the settlement amount somewhat more, down to $715 million, provided that a portion of the payment was paid in cash. Thus Adelphia agreed to pay $715 million, consisting of: (a) in the event of a standalone emergence, $600 million of common stock and $115 million of interests in the litigation trust; or (b) in the event of a sale, (i) $400 million of common stock of Adelphia's successor, (ii) $115 million of an interest in the litigation trust, and (iii) $200 million in cash (provided the Debtors are sold on terms that include more than $10 billion in cash). A condition of this payment is that Adelphia obtain full and clear title to all of the Managed Entities other than the two the Rigases were allowed to keep, Bucktail Broadcasting and Coudersport Cable.

In approving the settlement the Board itself had the experience of months of discussions and consideration of settlement issues and was abundantly aware of two overarching facts:

> (a) the Government's hard-nosed negotiation position that Adelphia make a substantial payment (initially $1 billion, and later no less than $695 million (in cash)) in order to resolve the government claims; and
>
> (b) the Government's escalating threats that if a resolution was not reached on terms satisfactory to the Government, the Debtors or the Managed Entities (or both) would be indicted, and/or the Managed Entities would be forfeited (in which case

Adelphia would be required to pay the difference in value that any such forfeiture may cause).

The Board reached its decision without further input from the Creditors' Committee, having been told by the Government that if Adelphia informed the Creditors' Committee of the proposed settlement terms, the settlement would be taken off the table, and the Government would take action adverse to the Company. Rather, the Government said, creditor inquiries should be referred to the Government, and Adelphia's Board was advised that, despite several requests from Adelphia that it do so, the Creditors' Committee had not contacted the Government. Adelphia's management and outside counsel decided not to defy the Government on this point, even though they were uncomfortable proceeding with such a significant decision without directly updating and discussing the issues with Adelphia's committees in advance.

The $715 million in value that Adelphia has agreed to contribute to a victim restitution fund is a substantial financial obligation and exceeds the amount that Adelphia initially hoped would be acceptable to the Government based on existing precedents. But Adelphia's professionals—highly skilled professionals—advised that a lesser negotiated number was not achievable. Having reviewed all of the evidence, I am not in a position to quarrel with that view. It is plain to me that Adelphia's lawyers (and others on the negotiating team) put into the negotiations all of the skill, and effort, that any stakeholder, or judge, could reasonably expect. They did an excellent job. Given the enormous pressures, and risks, faced by Adelphia, its settlement on these terms was, at the least, reasonable.

Under all of the circumstances, I find the settlement in the best interests of the estate, and fair and equitable.

E. Settlement Specifics

The Settlement Agreements are in three parts and are composed of three separate but interdependent agreements:

(1) The DoJ-Adelphia Agreement;

(2) The SEC-Adelphia Agreement; and

(3) The Rigas-Adelphia Agreement.

The terms are complex. More detailed terms are in the motion, and, of course, the underlying agreements. The most important terms, from my perspective, are as follows:

(1) Forfeited Managed Entities and Real Estate

The Rigas Family will forfeit to the Government their direct and indirect interests in all of the Managed Entities except Bucktail Broadcasting and Coudersport Cable. They will also forfeit various real estate properties and all securities in ACC. The Government will transfer to the Debtors, free and clear of all liens and encumbrances, the forfeited assets (other than certain forfeited real estate not related to the Debtors' cable operations).

(2) Victim Restitution Fund

The Government will establish a restitution fund for the purpose of providing restitution to persons or entities who held publicly traded securities of the Debtors that, in the sole determination of the Government, were victims of the conduct alleged in the Indictment. Adelphia will contribute $715 million in value to the fund. This settlement payment is conditioned upon Adelphia receiving full and clear title to the Forfeited Managed Entities,

various real estate properties and, at Adelphia's option, Adelphia securities owned by members of the Rigas Family. It will be comprised of the following:

(a) In the event of a standalone emergence of Adelphia from bankruptcy, Adelphia will contribute (i) $600 million of common stock of the reorganized Adelphia, and (ii) $115 million of an interest in the Trust, which interest will share a first priority with claims of unsatisfied senior creditors and will enjoy a liquidation preference entitling the holder to receive 50% of the initial net recoveries until up to $115 million has been distributed on account of such interest in the Trust. The common stock portion of this payment will be valued at the valuation fixed for such stock by this Court in connection with Adelphia's approved plan of reorganization.

(b) In the event of a sale of Adelphia or substantially all of its assets, Adelphia will contribute (i) up to $400 million of common stock of Adelphia's purchaser, (ii) $115 million of an interest in the Trust, which interest will share a first priority with claims of unsatisfied senior creditors and will enjoy a liquidation preference entitling the holder to receive 50% of the initial net recoveries until up to $115 million has been distributed on account of such interest in the Trust, and (iii) the balance consisting of not less than $200 million in cash. The cash portion of this payment is conditioned upon a sale of Adelphia or substantially all of its assets for an amount that includes at least $10 billion in cash. The substitution of cash for common stock, as provided for above, will be at Adelphia's sole option. The common stock portion of this payment will be valued at the valuation fixed for such stock by this

Court in connection with Adelphia's approved plan of reorganization.

Unless extended on consent of the Government, which consent will not be unreasonably withheld, Adelphia will make the above-referenced payments on or before the earlier of: (a) October 15, 2006; (b) 120 days after confirmation of a standalone plan of reorganization; or (c) seven days after the first distribution of stock or cash, as the case may be, to creditors under any plan of reorganization.

Pursuant to the Rigas-Government Agreement, the Rigas Family will have no right to assert a claim against or participate in the Restitution Fund. As a condition to receiving a distribution from the Restitution Fund, the Government will require any recipient, other than Adelphia, to release and discharge the Rigas Family (except for John and Timothy Rigas) from any and all actions, claims or liabilities of any nature whatsoever, and to dismiss any claim or litigation commenced by such recipient against the Rigas Family.

(3) The SEC Final Judgment

Adelphia will agree to the entry of a final judgment resolving the SEC's claims against ACC in its separate action *Securities and Exchange Commission v. Adelphia Communications Corp., et al.*, 02 Civ. 5776(PKC), pending before Judge Castel of the district court in this District. Pursuant to this final judgment, ACC will be permanently enjoined from violating various provisions of the federal securities laws.

Also pursuant to this final judgment, the SEC has agreed that if Adelphia makes that payment of $715 million in value to the victim restitution fund, Adelphia will

not be required to pay disgorgement or a civil money penalty to satisfy the SEC's claims.

(4) Rigas Legal Defense Costs and Indemnities

Adelphia will pay $11.5 million into a legal defense fund to pay the obligations to professionals retained by the Rigas Family. Adelphia intends to charge the Forfeited Managed Entities for this payment.

The Rigas Family and Peter Venetis, on the one hand, and Adelphia, on the other hand, will enter into mutual releases.

(5) Non-Prosecution and Continued Cooperation

The Government will not criminally prosecute: (1) Adelphia; (2) the subsidiaries listed in Adelphia's Form 10-K for fiscal year 2003; (3) subsequently-formed or acquired subsidiaries; and (4) any joint ventures in which the Debtors have or acquire a controlling interest for any crimes (except for criminal tax violations) related to Adelphia's participation in the conduct set forth in the Superseding Indictment against John, Timothy and Michael Rigas, and the SEC Complaint.

In connection with any matter relating to the Debtors' operations, finances and corporate governance between 1997 and emergence from bankruptcy, the Debtors:

(a) will truthfully and completely disclose all information about all matters about which the Government inquires;

(b) will fully cooperate with the Government and use their best efforts to provide information and testimony as requested by the Government; and

(c) will bring to the Government's attention all criminal conduct by or criminal investigations of

> Adelphia or its senior managerial employees which comes to the attention of Adelphia's Board or senior management.

The protections afforded by the non-prosecution agreement are expected to apply to any purchaser of all or substantially all of the assets of Adelphia (such as buyers Comcast and Time-Warner under the Sale Agreements), if the purchasers agree to cooperate with the Government in connection with its law enforcement needs.

Conclusions of Law

I.

Legal Standards

Fed. R. Bankr.P. 9019(a) provides:

> On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.

The legal standard for determining the propriety of a bankruptcy settlement is whether the settlement is in the "best interests of the estate." *In re Purofied Down Prods. Corp.*, 150 B.R. 519, 523 (S.D.N.Y.1993) (Leisure, J.) ("*Purofied Down Products*"). To determine that a settlement is in the best interests of the estate, the Supreme Court held in *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968) ("*TMT*"), that the settlement must be "fair and equitable." *Id.* at 424, 88 S.Ct. 1157. Such a finding is to be based on "the probabilities of ultimate success should the claim be litigated," and:

> [A]n educated estimate of the complexity, expense, and likely duration of . . . litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation.

Id. at 424-25, 88 S.Ct. 1157. *See also Purofied Down Products,* 150 B.R. at 523; *Official Comm. of Unsecured Creditors of Int'l Distrib. Ctrs., Inc. v. James Talcott, Inc. (In re Int'l Distrib. Ctrs., Inc.),* 103 B.R. 420, 422 (S.D.N.Y.1989) (Conboy, J.) ("*International Distribution Centers*") (determination as to whether proposed compromise is fair and equitable requires exercise of informed, independent judgment by court).

The settlement need not be the best that the debtor could have obtained. *See In re Penn Cent. Transp. Co.,* 596 F.2d 1102, 1114 (3d Cir.1979) ("*Penn Central*"); *accord International Distribution Centers,* 103 B.R. at 423 ("Indeed, a court may approve a settlement even if it believes that the Trustee ultimately would be successful.") (citations omitted). Rather, the settlement must fall "within the reasonable range of litigation possibilities." *Penn Central,* 596 F.2d at 1114. "[T]here is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion—and the judge will not be reversed if the appellate court concludes that the settlement lies within that range." *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir.) (Friendly, J.), *cert. denied,* 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 488 (1972) (construing *TMT* in context of settlement of derivative suit).

A bankruptcy court need not conduct an independent investigation into the reasonableness of the settlement but must only "canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness." *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir.1983) (internal quotation marks omitted).

It is not necessary for the court to conduct a "mini-trial" of the facts or the merits underlying the dispute. *Purofied Down Products*, 150 B.R. at 522; *International Distribution Centers*, 103 B.R. at 423. Rather, the court only need be apprised of those facts that are necessary to enable it to evaluate the settlement and to make a considered and independent judgment about the settlement. *See Purofied Down Products*, 150 B.R. at 522; *In re Energy Coop., Inc.*, 886 F.2d 921, 924-25 (7th Cir.1989). In doing so, the court is permitted to rely upon "opinions of the trustee, the parties, and their attorneys." *International Distribution Centers*, 103 B.R. at 423.

The decision whether to accept or reject a compromise lies within the sound discretion of the court. *See Purofied Down Products*, 150 B.R. at 522 ("A Bankruptcy Court's decision to approve a settlement should not be overturned unless its decision is manifestly erroneous and a 'clear abuse of discretion.' ").

II

The Texaco *Factors*

A.

In *In re Texaco Inc.*, 84 B.R. 893, 901 (Bankr.S.D.N.Y.1988), Judge Schwartzberg of this Court listed a number of factors to consider in approving a settlement. Drawing in part from class action litigation, he suggested that the Court consider:

(1) The balance between the likelihood of plaintiff's or defendants' success should the case go to trial vis a vis the concrete present and future benefits held forth by the settlement without the expense and delay of a trial and subsequent appellate procedures;

(2) The prospect of complex and protracted litigation if the settlement is not approved;

(3) The proportion of the class members who do not object or who affirmatively support the proposed settlement;

(4) The competency and experience of counsel who support the settlement;

(5) The relative benefits to be received by individuals or groups within the class;

(6) The nature and breadth of releases to be obtained by the directors and officers as a result of the settlement; and

(7) The extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.

See Texaco, 84 B.R. at 902.

B.

As is typical in motions where the exercise of a court's discretion is informed by multiple factors, here some of the *Texaco* factors have more relevance, and properly should have more weight, than others. I consider the *Texaco* factors as follows:

1. Benefits of Settlement v. Likely Rewards of Litigation

This factor—which tracks the first of the factors identified by the Supreme Court in *TMT, see* 390 U.S. at 424, 88 S.Ct. 1157 ("the probabilities of ultimate success should the claim be litigated")—is in my view the most important factor, and I weigh it accordingly.

Adelphia faces litigation risks of extraordinary magnitude. The Settlement Agreements provide the Debtors with certainty on issues that, if not resolved favorably, could have a devastating impact on the Debtors. In return for an agreement to provide the Government with $715 million in value for the creation of a restitution fund, the Settlement Agreements:

> (a) Eliminate a "real risk" of a criminal indictment of Adelphia that would have disastrous consequences to this reorganization.
>
> (b) Resolve more than $5 billion in disgorgement claims asserted by the SEC in a lawsuit against Adelphia arising from much of the same conduct for which John and Timothy Rigas already have been convicted.
>
> (c) Ensure that the Debtors' estates include hundreds of millions of dollars of value from the Forfeited Managed Entities, title to which otherwise might only be obtainable by winning hard fought litigation against the Rigases and defeating competing claims to these assets by, for example, the Government and creditors of the Rigas Family; and
>
> (d) Prevent a forced sale of the Forfeited Managed Entities that would destroy hundreds of millions of dollars in value that the Debtors otherwise likely would have to make up themselves.

In criminal cases, the conduct of an employee or other agent within the scope of the agent's employment, and for the benefit of the corporation, is often imputed to the corporation. Thus the Government could indict Adelphia for the imputed criminal conduct of Rigas Management, some of whom already have been convicted of substantial wrongdoing. Although Adelphia could assert certain defenses, courts differ on whether such defenses would be applicable. And the collateral consequences of an indictment likely would be disastrous for the Debtors and their stakeholders. Among other things:

(a) An indictment of the Debtors constitutes an "Event of Default" under their debtor in possession financing, providing the lenders with the right to require immediate repayment of the borrowings thereunder. Such acceleration would permit the lenders to terminate the agreement and declare all loans under the agreement immediately due and payable, which could force the Debtors either: (i) at best, to obtain a substitute facility, which likely would not be available given the indictment, or (ii) to liquidate their assets, destroying billions of dollars of value.

(b) In April 2005 Adelphia entered into sale agreements with Time Warner and Comcast pursuant to which they agreed to purchase substantially all of the Debtors' assets—a transaction that I was told is worth approximately $17.5 billion. With exceptions not material here, each of the Time-Warner and Comcast sale agreements requires, as a condition to the buyer's obligations to close, a settlement, dismissal or other resolution of the Government's claims, pursuant to which no portion of the assets or joint ventures to be transferred will

have any post-closing liability—including risk of criminal prosecution.

(c) An indictment also could result in the loss of critical cable franchises and licenses, which would materially impact the value of the Debtors' business through a loss of ability to do business.

(d) An indictment inevitably would discourage potential future creditors and business partners, making it difficult, if not impossible, for the Debtors to enter into asset sales or to obtain surety bonding needed to support important corporate activities such as franchise agreements or construction undertakings.

I consider these potential consequences—particularly the loss of postpetition financing and the failure to meet conditions for the Time-Warner and Comcast transactions—to be extraordinarily prejudicial to the interests of the stakeholders in these chapter 11 cases. Even if the probability of an indictment, and its occurrence, were quite small, the gravity of the consequences would nevertheless warrant extensive measures to forestall any such possibility.

Even in the absence of a sale, if the Debtors ultimately were able to emerge from bankruptcy on a standalone basis without resolving the Government's claims, (i) the pendency of an active case by the SEC could impact negatively the Debtors' ability to issue new securities and, thus, impact negatively the timing of emergence, and (ii) any securities issued in those circumstances could trade subject to a substantial discount for the risks arising from such uncertainties.

Further, if the Debtors were convicted, they would face the prospect of governmental fines or restitution. Pursuant to 18 U.S.C. §§ 3613(e) and (f), a bankruptcy

discharge does not affect a debtor's liability for criminal fines and restitution obligations. Such a fine could exceed $8.6 billion.

Similarly, if the Debtors were held responsible for the approximate loss in the market value of ACC's common stock, the Debtors could be ordered to pay restitution of $4.3 billion, which would not include the additional restitution that might be ordered to non-shareholder victims of the fraud.

And if the Debtors were indicted and convicted, the Government also could seek forfeiture of property that constitutes proceeds of a crime, or property traceable to the proceeds of a crime, *see* 18 U.S.C. § 981—possibly major portions of the Adelphia estate.

Then, Adelphia already is a defendant in a civil enforcement action brought by the SEC, and the SEC also has filed a proof of claim in the bankruptcy based on its lawsuit. Under the federal securities laws, the SEC is entitled to seek disgorgement as well as civil monetary penalties. Absent a settlement, the SEC staff has stated that, under a disgorgement theory, it intends to seek from the Debtors the approximately $5 billion to $6 billion in funds raised through public offerings during the period that the Debtors' financial statements contained material misrepresentations and omissions. By contrast, pursuant to the Settlement Agreements, the SEC has agreed to forego seeking any disgorgement or civil monetary penalties.

The elimination of any risk of liability to the SEC is an extremely significant benefit to the estate. First, absent a settlement, Adelphia has only a limited ability to defend against the SEC's liability case in the SEC Action. Adelphia does not contest the wrongdoing of the Rigas Family that the SEC alleges as the predicate of Adelphia's own liability. Thus, Adelphia could only pre-

vail in litigation if it could avoid liability as a corporate entity for the admitted acts of its top corporate officers.

Second, absent a settlement, the SEC's claim that it could be entitled to billions of dollars from Adelphia is a credible threat. Once it has been established that federal securities laws have been violated, a court has discretion to apply the equitable remedy of disgorgement to strip the wrongdoer of all profits collected through its securities violations. Although Adelphia could assert a variety of defenses to try to limit its liability, the SEC has a reasonable basis for its theory that the $5 billion to $6 billion of dollars raised by Adelphia in the public markets through fraud constitutes unjust enrichment subject to disgorgement. Moreover, in addition to the disgorgement amount, the SEC could seek and be entitled to civil monetary penalties equal to the amount of Adelphia's gross pecuniary gain as a result of its securities law violations. In effect, this could double the SEC's possible recovery.

Of course, the Creditors' Committee brought an adversary proceeding against the SEC to address these concerns, and points the Creditors' Committee made and would make in that adversary proceeding might well have merit. But the Creditors' Committee's ability to prevail in that adversary proceeding would be uncertain. At the least, the Creditors' Committee' action would be vigorously resisted, and likely would result in lengthy appeals, at least up to the Second Circuit. I am not in a position to predict the outcome of the Creditors' Committee's action against the SEC, but am in a position to say, and find, that it could go either way.

At this point, the Managed Entities are still owned by the Rigas Family. They are very valuable. In Adelphia's arms-length dealings with Time-Warner and Comcast, the Managed Entities were valued at $990 million ($967

million when Bucktail Broadcasting and Coudersport Cable are excluded), and the estate will suffer a corresponding reduction in the sale price under the Time-Warner and Comcast deals if the Debtors cannot deliver up the Managed Entities as part of the cable properties to be conveyed. The Settlement Agreements benefit the Debtors by insuring that the estates include the full value of these assets.

Of course it is true that the Debtors brought claims against the Rigases that, if successful, could result in the Debtors obtaining the right to all of the Managed Entities in litigation, either through a constructive trust, or by executing on these assets pursuant to a judgment. But that litigation, which I have seen first hand, has been hotly contested, and the Rigas Family has asserted (and in the absence of a settlement reasonably could be expected to continue to assert) numerous legal and factual defenses against the Debtors' claims. Based on the evidence I have seen to date (which I will grant is probably much less than all of the evidence I would ultimately see), I think there is quite a high probability that Adelphia would ultimately prevail on at least some of its claims, particularly the damage claims for waste and breach of fiduciary duty. But whether Adelphia could win quickly, such as on its motion for summary judgment, and on its constructive trust claim, which is simultaneously more important to prevail on and difficult to show, is a closer question. And Adelphia might well have to address the complexities of a situation where it might establish wrongful conduct on the part of John, Timothy, Michael, and even James Rigas, but might not be able to show it on the part of others who might have an interest in the Managed Entities. Thus there is a material risk that the Debtors could not obtain the right to 100% ownership of the Managed Entities through liti-

gation. And even a successful outcome in such litigation likely would take substantial time.

The Settlement Agreements eliminate these risks to Adelphia, along with the enormous costs of pursuing that litigation, which I discussed in my recent decision on the Rigases' funding motion. *See Adelphia*, 323 B.R. at 390-92. Under the Government-Adelphia Agreement, Adelphia's settlement payment is conditioned upon receiving full and clear title to the Forfeited Managed Entities from the Government.

Of course, the $715 million in value that Adelphia has agreed to contribute to a victim restitution fund is a substantial financial obligation. But I agree with Adelphia and the other settlement proponents that given the tremendous advantages of settling, the benefits of the Settlement Agreements far outweigh the discounted probability of achieving a similar outcome through litigation.

By itself, the complete resolution of Adelphia's issues with the Government provide enormous value to the estates that could justify a settlement payment by Adelphia of hundreds of millions of dollars pursuant to the standards of Bankruptcy Rule 9019. The settlements resolve the SEC's claims against the estates of over $5 billion, as well as eliminate the devastating risks of a criminal prosecution. It is far from certain that Adelphia ever could achieve the same, or a remotely similar, result through litigation. And even if Adelphia could ultimately defeat a criminal prosecution by the DoJ, the decision to indict alone would be devastating for the reasons explained above.

The Settlement Agreements, however, go beyond simply resolving Adelphia's issues with the Government and also are contingent upon a transfer of ownership of the Managed Entities to Adelphia. This ensures the Debtors'

estates hundreds of millions of dollars in value that might never otherwise be achieved, even through protracted litigation. It also ensures that Adelphia does not face the "double hit" of seeing the Managed Entities forfeited to the Government and then having to compensate the Government for the diminished value of these assets in a forced sale.

2. *Prospect Of Complex And Protracted Litigations If The Settlement Is Not Approved*

I consider this factor—which tracks the second of the *TMT* factors, *see* 390 U.S. at 424, 88 S.Ct. 1157 ("the complexity, expense, and likely duration of the litigation")—to be worthy of considerable weight as well.

Any litigation with the Government necessarily will be complex. Any criminal prosecution of Adelphia would entail a lengthy and complicated presentation of evidence; indeed, the criminal trial of John, Timothy and Michael Rigas took over four months. In the event of a conviction, the Government likely would pursue criminal forfeiture proceedings to extinguish Adelphia's claim to the Managed Entities, or worse, the assets of Adelphia itself—in either case a proceeding with additional, complex issues of law and fact. The SEC's civil action likewise would entail complex legal and factual issues with potentially enormous adverse consequences to Adelphia.

Because any potential actions or claims taken by the Government against the Debtors could destroy billions of dollars of value, the Debtors would necessarily have to pull out all the stops in their efforts to resist the Government's efforts. They would be involved in "bet the company" litigation.

Likewise, on the Adelphia-Rigases adversary proceeding front, I do not have current figures, and may never have learned with any degree of accuracy, how

much that litigation has cost Adelphia, or what its current monthly legal fees budget is. But based on the many proceedings in that litigation I have seen, and the papers I have had occasion to read, I can reasonably conclude that the fees have been enormous, and that they would likewise increase enormously with time.

3. Competency And Experience Of Counsel Who Support The Settlement

I give this factor—which along with the factors discussed below, is encompassed within the third of the factors identified in *TMT, see* 390 U.S. at 424, 88 S.Ct. 1157 ("all other factors relevant to a full and fair assessment of the wisdom of the compromise") considerable weight, though less than the first two factors.

The Debtors were advised by a group of outside counsel with preeminent experience in the relevant fields. I will not repeat my factual findings in this respect (see page 150 above) here. It is sufficient to say that Adelphia received first-rate advice. No objector argues, or could argue, to the contrary.

4. Proportion of "Class Members" Who Support or Do Not Object

I consider this factor, which plainly cuts against approval of the settlement, but give it only modest weight. This settlement is quite unpopular with unsecured creditors, because many of them acquired their claims after the fraud at Adelphia became known—which would not affect their rights in any way in this bankruptcy case, but likely would affect their rights to share in any victims restitution fund.[2] And they oppose

[2] I note that despite some argument I heard at the hearing implying to the contrary, this "numerosity" factor is the only area

it because equity holder victims could recover from the fund the Government establishes outside of the bankruptcy court, but creditors would have priority over equity holders with respect to assets remaining in the estate. The settlement is popular with the estate's common stock equity holders, for exactly the same reasons. And the banks are essentially neutral, because the settlement leaves the estate's claims against them for another day.

But in my view, the approval of a settlement cannot be regarded as a counting exercise. Rather, it must be considered in light of the *reasons* for any opposition, and the more fundamental factors—such as benefits of settlement, likely rewards of litigation, costs of litigation and downside risk—described above. That is particularly so in cases like this one where a debtor's board is the fiduciary for *all* parties in interest, who naturally have competing interests with respect to limited assets that are insufficient to satisfy everyone's needs and concerns. In such cases, where the settlement proponent is trying to maximize value for all, or to minimize risk for all, concerns of that character plainly trump the head count in support.

5. Relative Benefits Within the Class

I give this factor (which also cuts, somewhat, against approval of settlement) some weight, but only some weight, for the reasons described in connection with the numerosity discussion just above. In my view, it was preferable, and not just appropriate, for Adelphia's

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where the time creditors acquired their claims is relevant on this motion. It is fundamental, in bankruptcy cases, that an acquirer of a claim has no lesser rights than any other creditor.

Board to consider the good of the entire enterprise, as contrasted to the needs and concerns of any particular constituency, even a major one.

6. Nature and Breadth of Releases

I give this factor (however broadly or narrowly it is construed) no weight, as I regard it as inapplicable. The Adelphia Board members who considered the settlement were wholly disinterested, and the cross-releases Adelphia would exchange with the Rigases were not unduly broad under the circumstances.

7. Extent To Which The Settlement Is A Product Of Arms Length Bargaining

I give this factor moderate weight on the motion now before me, though I would give it much greater weight if I ever thought it had not been satisfied. The Debtors and the Government have been engaged in protracted negotiations for nearly a year. During this period, the Debtors and the Government met more than 10 times and had countless additional discussions about a possible settlement. The Debtors repeatedly tried to negotiate a lower settlement number with the Government and agreed to pay $715 million in value only after the Government rejected several prior lower settlement offers. And Adelphia's ultimate offer was only in the context of a global settlement that ensured that all but two of the Managed Entities would be transferred to the Debtors.

As I saw firsthand, the Debtors fought the Rigases with extraordinary vigor—even to the point of taking two of my decisions up on appeal, and securing a partial reversal of one of them. They also met on numerous occasions with counsel for the Rigases. Since prior to the inception of these cases, the Debtors tried, through nego-

tiation and litigation with the Rigas Family, to resolve the Managed Entities ownership issues. None of these efforts were successful prior to the entry into these agreements. The Settlement Agreements resolve these issues, after vigorous litigation and negotiation.

C.

For the foregoing reasons, I conclude, in the exercise of my discretion, and based upon my independent judgment, that the settlement is fair and equitable, and in the best interests of the estate. In its effort to protect the estate against consequences that could cost stakeholders billions of dollars, and doom not just a reorganization but the very future of the enterprise, it falls well within the range of reasonableness.

III.

The Objections

Notwithstanding the foregoing, the motion has elicited numerous objections, principally by unsecured creditors, and most extensively by the Creditors' Committee. To the extent I have not previously addressed them, I will discuss them in turn.

A.

General Objections

1. Too Much to the Government

Of course most of the stakeholders in this case—and, for that matter, the Court—would be happier if the

estate's exposure on the risks it faced could have been satisfied for less. But any settlement cannot be viewed in a vacuum. *See Texaco,* 84 B.R. at 901 ("The duty of a bankruptcy judge to reach an intelligent, objective and educated evaluation of settlements cannot be carried out absent factual background.") (internal quote marks omitted). Rather, any settlement must be evaluated in light of the strengths and weaknesses of the settling entity's case, and the downside risks in the event of an adverse outcome.

The objectors, or at least most of them, do not quarrel with the Board's business judgment given the threats the company faced, but say that the settlement arose from Government coercion—indeed, what one Board member described as a "shakedown." They argue that even if the Board could not be expected to stand up to the unfair pressure on Adelphia, I, as a reviewing court, should recognize the coercion and decline to approve the settlement for that reason. But fully understanding the frustration of stakeholders (and Board members, for that matter) in this regard, I think that the argument stretches the "coercion" concept too far. It is really a double entendre. Where coercion is unlawful—the stuff that makes RICO cases, for example—disapproval of any resulting settlement presumptively would be appropriate, and perhaps essential. But where the "coercion" results from differences in bargaining power, as a consequence of law or fact, or governmentally granted authority and discretion (such as the authority and discretion we grant to prosecutors, to achieve a common good), that is a wholly different kind of "coercion." As one of the banks' counsel aptly noted in argument on this motion, it is what we call "leverage."

The bargaining power with which Adelphia had to negotiate was hardly optimal, and the amount proposed

to be paid to the Government is reflective of that. But there is no rule of law, nor should there be one, that says that litigants with weaker negotiating positions cannot enter into settlements commensurate with their weaker positions; indeed, in many instances they will be the ones whose needs are best served by a settlement.

Then, the Creditors' Committee, along with most of the other objectors, argues, as a major predicate for its objection, that the DoJ was bluffing, and that it never would have really indicted Adelphia. This, unfortunately, cannot be proved or disproved, at least without inappropriate inquiry into internal governmental processes and plans. Any conclusion on my part that the DoJ would not have done what it threatened to do would be sheer speculation.

Would the DoJ have indicted Adelphia, with the threat to the recoveries for innocent stakeholders that such an indictment would have entailed? One would think not, but the DoJ had done exactly that to Arthur Andersen, with those exact consequences. It was at least prudent for Adelphia's Board to protect the entity under its stewardship from its destruction, and to avoid taking such a gamble. Though I would likely not condemn this or any other Board if it had made a different decision, based on a belief (if founded on appropriate due diligence) that the DoJ would not act irresponsibly, I do conclude, and expressly find, that premising a settlement on the avoidance of such draconian consequences was plainly reasonable, and well within the range of reasonableness for making a tactical judgment of this nature. Gauging downside risk is a critical aspect of the litigation (and settlement) process. When the consequences of a wrong decision are so huge, it is not unreasonable to hedge against them.

Likewise, the Creditors' Committee's argument that if the DoJ ever fairly considered the so-called "Thompson" factors, the DoJ would not indict, calls for the same kind of speculation. This is the exact point argued by Adelphia's negotiation team, without success. Once more, the Adelphia Board cannot be faulted for declining to bet the company on what would be little more than a guess as to the decision the DoJ would make. That is especially true since the "Thompson" factors are merely internal DoJ guidelines, and do not provide a private right of action, or a predicate for judicial review.

I am not in a position to condemn the Adelphia Board, or this settlement, based on what is in essence speculation as to what the DoJ would have done. That is what settlements are all about.

Listening to the arguments made by the Creditors' Committee and other objectors on this motion, I was struck by how so many of the points they made to me had likewise been made by Adelphia's negotiating team, in their own communications with the Government. And upon review of the PowerPoint slides the Adelphia team used, it plainly appears that the Adelphia team made those points to the Government with the same skill that the Creditors' Committee made those points to me. When all of the right negotiating arguments have been made, and made well, it gives rise to a compelling inference that the negotiators got the best deal obtainable, and, at the least, that their deal falls well within the range of reasonableness.

2. Too Little From the Rigases

The Creditors' Committee and other creditors likewise object to the fact that the Government let the Rigas keep part of their assets, and along with that, allowed them to have some remaining funds to defend themselves. My

reaction to that is simply a variant of the observations just noted. Allowing the Rigas to keep what they would keep was something that the Government wanted, and, indeed, that the Government paid for, reducing its settlement demand by $10 million to take into account the Rigases' rights to retain Bucktail Broadcasting and Coudersport Cable.

Moreover, any analysis of what the Rigases gave up, and could keep, requires consideration of the alternatives—recognizing the DoJ's ability to get the Rigases' assets by forfeiture, and the hurdles Adelphia faced in recovering the Rigases' assets before the DoJ, and/or with a priority over the DoJ. As previously noted, based on facts now known to me, I regard it as likely—strongly likely—that Adelphia would ultimately prevail over the Rigases on Adelphia's common law claims, especially those for breach of fiduciary duty. But whether Adelphia could prevail quickly, on summary judgment, and especially on its constructive trust claim, is much more debatable, by reason of the heavy burdens in this and every other Circuit to obtain victory on summary judgment; by reason of the demanding requirements for the imposition of a constructive trust; and because of the difficulty of securing summary judgment against *each* of the persons or entities who had an interest in the Forfeited Assets, and not just John, Timothy and even Michael and James Rigas. And success on Adelphia's part on the constructive trust claim would be of considerable importance, because if Adelphia merely secured a money judgment against the Rigases, that might well not trump the DoJ's property interest in forfeited property.

In short, given the limits on the collectibility of Rigas assets, and the burdens and delays that due process in lit-

igation sometimes entails, Adelphia did very well in securing as much from the Rigases as it did.

3. Too Little From the Banks

The Creditors' Committee, and many creditors, also complain of the fact that Adelphia did not fund the settlement out of the hide of the prepetition banks, especially those that were the lenders on Adelphia's co-borrowing facilities. I find that argument unpersuasive. It fails satisfactorily to recognize the entitlement of the banks, like any other litigant, to due process before their claims, security interests, or other property could be taken away. The Creditors' Committee, with Adelphia as a co-plaintiff, has a major adversary proceeding pending, on behalf of the estate, against the banks. And if the Creditors' Committee prevails, the banks will then be held fully accountable for any and all wrongful conduct for which any of them is responsible. But the banks have not been found to have acted wrongfully yet, if they ever will be, and it will be this Court, or a higher court, that makes that determination—not the Debtors, and not the Debtors' unsecured creditors. The structuring of this settlement was not the appropriate time, or manner, to do that.

4. Use of Victims' Fund

The next point, urged by the Creditors' Committee, all or substantially all of the other unsecured creditor objectors, and the Ad Hoc Committee of Senior Preferred Shareholders, is that the settlement should be disapproved because of the likelihood that the DoJ or SEC will make the victims restitution fund available, in major part, to victims who are equity security holders, or to investors of debt securities who, if they asserted claims

in these chapter 11 cases, would be subordinated under Bankruptcy Code section 510(b). The objectors likewise argue that the SEC would in essence be trying to recover a penalty, which is subordinate to normal unsecured claims under Bankruptcy Code section 726(a)(4).

I assume that the Government will indeed distribute the value as the unsecured creditors fear. I also assume that it is at least arguable that if we had a liquidation here, the SEC's claim would be subordinated as a penalty. But I do not find either of these grounds to be a satisfactory basis for disapproval of the settlement here.

I start with the assumption, not surprisingly, that the ability of equity security holders to share in assets of the Adelphia estate, under any plan of reorganization, would be subject to the Absolute Priority Rule, and that except to the extent creditors might otherwise agree, equity holders could not receive distributions under any plan until and unless more senior claims, such as those of unsecured creditors, were satisfied in full. I similarly start with the assumption that claims of one-time creditors arising out of their purchases or sales of Adelphia securities would have to be subordinated to the claims of existing creditors of the same class, as section 510(b) expressly provides.

But here equity holders and defrauded noteholders would not be sharing in assets of the estate under a plan, or in a chapter 7 liquidation. Rather, they would be sharing in a fund to be created and owned by the Government, sharing in assets the Government would be obtaining as a consequence of the totality of its bargaining power in this case—which bargaining power in turn derives from the DoJ's indictment power, the DoJ's forfeiture power, and the SEC's ability to bring an enforcement action and to file and recover on a proof of a claim.

Thus, while defrauded equity holders will plainly have to confront the Absolute Priority Rule and section 510(b) when trying to share in assets of the estate *in this Court*, what I am asked to approve here is twice removed from that scenario. Not only does this motion not involve a reorganization plan contemplating a distribution to equity; it does not even involve an objection to the SEC's claim, or the merits of the Creditors' Committee adversary proceeding, with its related subordination issues. Rather it is a 9019 motion, raising the fundamentally different issues, under the standards discussed at pages 158-159 above, as to whether controversies—one (but only one) of which is differences in views as to how the SEC's proof of claims would be dealt with at such time as its allowability and priority were litigated—should be compromised.

Whether the SEC's claim would have been allowed under these circumstances, and/or subordinated, is a matter of fair debate. The issue is one that bankruptcy judges, practitioners and scholars have discussed amongst themselves for some time, without a definitive answer. So far as I am aware, the issue is, for all practical purposes, one of first impression.

But while the issue of the allowability or subordination of the SEC claim, when and if litigated, is a close and difficult one, it is not the issue I have to determine here. And indeed, the very difficulty of the underlying issue makes the wholly different issue before me—whether a settlement of such a controversy is inappropriate or unlawful—a rather easy one. The real issue before me, of course, is whether the Government and the Debtors could settle a controversy as to which that close and difficult issue is an element, and the answer to that plainly is "yes." It is no different than the multitude of

other difficult issues that are settled in litigation all the time.

If there ever was any doubt as to that, it was resolved by the decision of Judge Gonzalez of this Court, dealing with the essentially identical issue, in *In re WorldCom,* Case No. 02-13533(AJG), ECF # 8125 (Bankr.S.D.N.Y. Aug. 6, 2003). There Judge Gonzalez approved a settlement involving this very issue, finding no need or occasion to decide the underlying question, but finding that the undecided nature of the issue itself was a factor warranting approval of the settlement. He observed in this connection:

> Finally, although it is argued that the ultimate distribution to securities holders as contemplated by the settlement is violative of the "absolute priority rule" and subject to subordination under section 510 of the bankruptcy code, and even if this were ultimately determined to be the correct legal interpretation from a bankruptcy standpoint, nonetheless, there are sufficient legal issues that must be addressed—including the identity of the claimant, the discretion afforded the SEC in its use of the penalty, and the overall impact of Sarbanes-Oxley, as well as other issues that may be raised in a litigation to subordinate the claim—which issues, when combined with the unsettled nature of the law in this area, furnish sufficient doubt as to the outcome of any such litigation.

Exh. A at 3-4. He further noted that this uncertainty supported WorldCom's position that the settlement was appropriate. *Id.* at 4. And he noted, in connection with that absolute priority rule dispute, the fundamental principle, noted above, that:

> In considering approval of a settlement, the Court is not required to resolve the underlying legal issues related to the settlement. Rather, the Court must canvas the issues and determine whether the settlement "falls below the lowest point in the range of reasonableness."

Id.

To the extent this motion is not identical to the one considered in *WorldCom*, the issue is even more plainly one appropriate for settlement. For here, as noted, the fund to be established by the Government—whose disposition, the Government might well legitimately say, is *its* business—will have been derived from a settlement emerging from the DoJ's indictment power and forfeiture power, along with the SEC's right to file and recover on a proof of a claim.

Likewise, while it is very possible that what the SEC might receive on its proof of claim would be deemed to be a penalty or forfeiture, it is also possible that what the SEC might receive would be deemed to be restitution or something else, making this aspect of the controversy no less a fair matter for debate. And to state the obvious, this is not a case under chapter 7, and will hopefully never be one. In chapter 11, by contrast, section 726(a)(4) arguments might be of limited usefulness. While it is true that chapter 11's "Best Interests of Creditors" rule, *see* Code section 1129(a)(7), would make the section 726(a)(4) status of any SEC claim relevant in a case under chapter 11 of the Code, it is also true that such would turn on a host of other factors incapable of prediction at this time—most notably the degree of acceptances of a reorganization plan by creditors, and the value to be distributed under any chapter 11 plan. And in chapter 11, the failure to satisfy the Best Interests of Creditors rule would merely result in the inability to

confirm a plan—not subordination or disallowance of the claim in question in the chapter 11 case.

As a result, the objections by unsecured creditors and preferred shareholders premised on the "penalty" argument are not quite as strong as they were asserted to be. *"Penalty" issues would present the same kind of gray* area for which settlement would be classically appropriate.

Here, as in *WorldCom*, I have canvassed the issues; have determined that the matter of SEC claim allowability and subordination is an exceedingly close question, which could easily go either way; have determined that the matter of SEC claim allowability is only one of several underpinnings for the settlement; and have determined that a settlement that avoided rolling the dice on the underlying issues hardly "falls below the lowest point in the range of reasonableness."

5. Prejudice to the Bank Litigation

The Creditors' Committee voiced a fear that this settlement could prejudice the estate in the presently pending adversary proceeding against the banks. This was a legitimate concern, and requires the addition of language in the approval order to ensure that such does not happen. Neither side's position in that controversy should be strengthened or weakened as a consequence of the settlement.

Adelphia, the Creditors' Committee and certain banks worked to agree upon protective language, now embodied in paragraph 9 of the proposed order, and unless there is unanimous agreement as to any alternative, I will utilize that language without change. I will not, however, issue an advisory opinion as to how I might construe paragraph 9 in the event of any future controversy with respect to it—especially when the circumstances that

might trigger such a controversy have not yet become known. *See, e.g., Bank of New York v. Adelphia Communications Corp. (In re Adelphia Communications Corp.)*, 307 B.R. 432 (Bankr.S.D.N.Y.2004) (declining to issue advisory opinion on meaning of bond indenture "X Clause"). Parties' rights to be heard before me in the event of any future controversy will be reserved.

B.

"Sub Rosa Plan"

Huff argues that the settlement amounts to a "sub rosa" plan. Huff argues, in substance, that "cornerstone issues" concerning the subordination of the SEC's claim and compliance with the absolute priority rule should be subject to the safeguards of confirmation, and that they should not be decided within the context of a motion to approve a settlement.

I cannot agree with the contention that this is a sub rosa plan—among other reasons, because I cannot agree with the premise. The settlement does not invoke the asserted "cornerstone issues," for the reasons described in Section III(A)(4) above. Rather, it is twice removed from them, as it involves only a settlement, and, indeed, one under which the resolution of the SEC claim is only a part. It is well established, of course, that compromises may be effected separately during reorganization proceedings or in the body of the reorganization plan itself. *See Texaco*, 84 B.R. at 901.

C.

Requiring Victims to Issue Releases

The Class Actions Plaintiffs and Huff object to provisions in the settlement agreements that require victims to provide certain Rigases (not John Rigas and Timothy Rigas) a release. They argue that this would undermine victims' ability to recover non-forfeited assets.

However, this is not an appropriate objection to the settlement, at least in this Court. The argument was presented to Judge Sand, and rejected by him, in the court where the argument should have been made. To the extent any such arguments were not presented to Judge Sand, or addressed by him, they should be raised in his court. The objections, which focus on the needs and concerns of victims and their right to share in the victims fund, should be heard in the court that will supervise the fund, and do not go to whether the settlement agreements are in the best interests of the estate.

D.

Burdens/Benefits Allocation Issues

Several groups of unsecured creditors—the Ad Hoc Committee of ACC Senior Noteholders, the Ad Hoc Committee of Arahova Noteholders, and the Ad Hoc Trade Claims Committee (who hold claims against entities at different levels in Adelphia's rather complex parent-subsidiary structure) voice concerns—in many respects, mirror images of each other—as to whether they would inappropriately be prejudiced by any payment on behalf of the estate. In the view of each, the burden of the settlement should be borne, in whole or in

material part, by creditors at other levels, or by creditors of different entities. The ACC Senior Noteholders go a step further, and argue that this settlement cannot be approved until the intercreditor disputes, which could also involve benefits of the settlement, along with burdens, are resolved.

Turning to the second issue first, which raises a threshold issue as to whether the settlement should be approved at all, I disagree with the ACC Senior Noteholders. For the reasons stated above, I believe that this settlement should be approved, and I will note expressly that I find it to be in the best interests of, and for the benefit of, *all* of the 220 or so debtors in Adelphia's jointly administered chapter 11 cases—all of which would be hugely prejudiced if either they or their affiliates were indicted, and all of whose assets would be subject to forfeiture in the event the controversies with the Government were not settled. While I recognize that the *magnitude* of the burdens, or benefits, from this settlement might appropriately vary from one to another of the 220 debtors, I have no doubt whatever that the settlement is advantageous for all, and I reject the notion that approval of the settlement should be denied or delayed for the resolution of these individual intercreditor disputes—especially given the importance to Adelphia of the prompt resolution of the issues underlying this settlement. *Cf. Nellis v. Shugrue*, 165 B.R. 115 (S.D.N.Y.1994) (Sotomayor, J., then a district judge) (affirming Chief Judge Lifland's approval of a settlement agreement even though it did not contain any distribution plan but left ultimate resolution of distribution issue to outside neutral party). That is particularly so since the consideration under this settlement would not actually be paid by Adelphia any time soon, and, indeed,

since the currency by which the settlement is paid would not be fixed until a materially later time.

However, I agree with those creditors when they say that the allocation of the burdens and benefits of the settlement—*e.g.*, the payment of the $715 million, and the allocation of the excess value deriving from the Managed Entities—should be done in a fashion that does not prejudice their rights in their respective intercreditor disputes. It is reasonable to expect that creditors at the different levels in the corporate chain will have different perceptions as to what is fair when it comes to the allocation of settlement burdens and benefits. Fairness requires that mechanisms be created to permit those issues to be resolved—consensually, if possible, but otherwise with due process.

All would agree, I think, that the rights of various creditor constituencies on these intercreditor disputes should not be prejudiced by the settlement approved today, and paragraph 9 of the proposed order does that quite capably. But the creditor groups have a legitimate need to get a determination on the allocation issues, if they cannot agree, and supplemental mechanisms need to be established to accomplish that. I am uncomfortable with the proposal made by the Debtors, in their reply papers, that this be left to the plan negotiation process. While I always welcome consensual agreement, I think the Debtors' proposal lacks the necessary mechanism for giving creditors their day in court on the allocation issues if agreement cannot be achieved.

Accordingly, I believe that such an opportunity for judicial resolution, if necessary, must be provided. But it need not be done on a lightning fast basis, and indeed should not be, as the issues are complex and they likely will be interwoven with other complex issues involving intercompany obligations. Also, none of the Debtors will

actually be writing out a check to the Government any time soon, and I thus think that concerns creditors articulated as to how any such payment would be accounted for prior to resolution of the allocation issues are illusory.

At this juncture, I will direct that stakeholders who wish to take a position on allocation issues caucus amongst themselves, together with professionals for the Debtors and the Creditors' Committee (who likely will not be antagonists on these issues, but who are likely to be helpful in the process) to establish a game plan for the resolution of the allocation issues. That game plan should include the creation of an escape valve litigation mechanism (to be handled as a contested matter) to resolve any disputes if necessary. The game plan should provide sufficient time to get these issues resolved before confirmation, and, if possible, before the finalization of any reorganization plan. I will leave it to the parties, in the first instance, to decide on the best way to move the process forward, but I will make myself available, as usual, for conference calls, chambers conferences, or more formal hearings if desired.

E.

Banks' Substitute Liens

Several prepetition banks filed responses or limited objections noting that they do not oppose the settlement as such, but that they wished to ensure that security interests they now have in the Managed Entities, which would be lost when the Managed Entities passed to Adelphia in "cleansed" condition—free and clear of liens—would be replaced with substitute liens to protect their collateral position. After caucusing with the banks,

the Debtors agreed to language in the proposed approval order that would meet the banks' concerns in this regard.

However, the Debtors' measures to meet the banks' concerns then triggered objections from others—particularly the Equity Committee, which otherwise supports the settlement. They argue that the banks thereby got more than that to which they were entitled, and that if the banks want to protect their liens, they should go before Judge Sand, in forfeiture ancillary proceedings, to do so.

I will not deprive the banks of the protections the Debtors agreed to, and will include the desired provisions in any approval order. In addition to having the liens they wish to protect, which are on partnership and similar ownership interests, the banks have guaranties from the underlying entities that would be claims on their underlying assets in any event, to which the ownership interests would be structurally subordinate. In other words, the ownership interests would have value only to the extent that the guaranty obligations had been satisfied anyway. Thus there would be minimal prejudice to other stakeholders in the case as a consequence of giving the banks the comfort they requested. And the concept underlying the substitute lien measures to protect the banks, which may be analogized to an "adequate protection," is not offensive to me.

F.

Asset Sale Ambiguities

Time-Warner and Comcast have provisions in their asset purchase agreements that give them comfort that the cable properties Time-Warner and Comcast will be buying would not be indicted or subject to forfeiture.

The Creditors' Committee has expressed a concern that even after approval of this settlement, Time-Warner and Comcast might have lingering doubts as to their protection in this regard, and that such might give them an unintended ability to be relieved of their contractual duties under their asset purchase agreements with Adelphia. This, the Creditors' Committee argues, could destroy the mutuality of obligation under the asset purchase agreements, and deprive Adelphia of one of the most important benefits of the settlement.

Though I have no reason to question Time-Warner's or Comcast's sincerity, I agree that preserving mutuality of obligation, and avoiding uncertainties and ambiguities down the road, is of the highest importance. Adelphia, the Creditors' Committee, Time-Warner, Comcast and the DoJ are to work cooperatively to ensure that upon approval of the settlement, Time-Warner and Comcast will have the comfort they need, and that Time-Warner and Comcast will then acknowledge that—and thus that Time-Warner and Comcast will give the Creditors Committee and Adelphia the comfort they need. I am flexible as to the mechanics. Any means that reasonably satisfies those needs and concerns will be satisfactory to me.

G.

Class Action Plaintiffs' Objections

Certain class action plaintiffs argue that the settlement is too favorable for Adelphia. In particular, they contend that forfeited Rigas assets will inappropriately wind up in Adelphia's hands, because Adelphia could not establish a superior claim to the Rigas assets in a forfeiture proceeding in the district court. Hence, they argue, the aspect of the settlement providing for the Managed Enti-

ties to pass to Adelphia is unlawful, as violative of the Justice for All Act.

However, I cannot disapprove the settlement on that basis. After review of the transcript of the proceedings before Judge Sand, I believe that Judge Sand ruled on this exact issue, after he explicitly asked counsel for the class action plaintiffs to articulate the bases for their contention that the settlement was unlawful, and no meaningful response was forthcoming. And to the extent that he did not rule on the matter, I believe that any concerns in this regard properly should be brought before Judge Sand, and not me. The stated objection by the class action plaintiffs urges not that the settlement is too expensive for Adelphia, but rather that it is too favorable. An objection of that character does not address the needs and concerns of the estate, nor does it involve any legally cognizable rights over which I have jurisdiction.

Accordingly, the class action plaintiffs' objection must be overruled.

H.

Cable Venture Objections

Century/ML Cable Venture, a joint venture of Adelphia's subsidiary Century Communications and of an affiliate of Merrill Lynch, does not oppose the settlement, but has filed a limited objection to ensure that it is not prejudiced in claims and plenary litigation it has with Highland Holdings, one of the Rigas Owned Entities that will be forfeited. But I am confident that either the Joint Venture would not be prejudiced at all by the forfeiture of Highland Holdings under this settlement, or would not be prejudiced in any material way.

The Cable Venture has asserted claims against Highland, but Highland is subject to forfeiture to the Government with or without Adelphia's consent, and the harsh truth, from the Cable Venture's perspective, is that any claims the Cable Venture has against Highland will be against a defendant who is judgment-proof. The Cable Venture's other concern, that Highland would proceed against the Cable Venture, and the Cable Venture could not assert setoffs against Highland, while theoretically possible, is unlikely to occur, and could easily be protected against. If the Government keeps Highland after the forfeiture, the Government is unlikely to continue Highland's litigation against the Cable Venture (particularly given the Government's first-hand knowledge of the Rigas conduct that would be imputed to Highland), and if Adelphia ultimately gets Highland after the forfeiture, Adelphia is likely to act similarly. And since any Cable Venture litigation will be before me in any event, I can put into place measures to ensure that Highland does not unfairly deprive the Cable Venture of setoff defenses to which it would otherwise be entitled.

Adelphia has provided clarifications to address the Cable Venture's other stated concerns, which I find to be satisfactory.

I.

Franchisors' Objections

Several local franchising authorities—communities in which Managed Entities do business—have not objected to the settlement as such, but wish to ensure that their regulatory rights with respect to the Managed Entities are not impaired. The Debtors have agreed to a stipulation under which the local franchising authorities' rights

will be preserved, and an agreement of that character is satisfactory to me.

J.

Other Objections

To the extent other objections have been made (such as the argument that the administration of insolvent companies or assets that once came from them should be performed by bankruptcy courts, and not the SEC), I find them unsupported by the facts, repetitive, or otherwise lacking in merit, and plainly immaterial to the approval of this settlement. All are rejected.

Conclusion

For the foregoing reasons, the settlement is approved. None of the settlement agreements need be changed in any way, but counsel for Adelphia is to amend its proposed approval order, in consultation with objectors, to fully address the additional protective provisions and reservations of rights that I have authorized and required in this decision, and to otherwise conform with this decision. In the event of a failure to secure unanimous consent to the form of the order (without prejudice, of course, to rights to appeal), Adelphia is authorized and directed to settle the order on no less than two business days' notice by fax or hand.

As I find that the required business need for a waiver has been shown, the order may provide for a waiver of the 10-day waiting period under Fed. R. Bankr.P. 6004(g).

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11 Cases
Case No. 02-41729 (REG)
Jointly Administered

IN RE

ADELPHIA COMMUNICATIONS CORPORATION, *et al.*,

Debtors.

ORDER APPROVING THREE RELATED AGREEMENTS BETWEEN THE DEBTORS AND THE SECURITIES AND EXCHANGE COMMISSION, THE DEBTORS AND THE DEPARTMENT OF JUSTICE, AND THE DEBTORS AND THE RIGAS FAMILY

Upon the motion dated April 28, 2005 (the "Motion") of the above captioned debtors and debtors in possession (collectively, the "Debtors") for entry of an order, pursuant to Bankruptcy Rule 9019 and sections 105 and 363 of the Bankruptcy Code, approving three related agreements between the Debtors and the Securities and Exchange Commission, the Debtors and the Department of Justice, and the Debtors and the Rigas Family; and the Court having reviewed the Motion and the objections to the Motion, and having heard and considered the state-

ments and evidence in support of and against the relief requested therein at a hearing before the Court (the "Hearing"); and the Court having determined that the bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and the relief requested in the Motion being in the best interests of the Debtors and their estates and creditors and supported by sound business reasons; and upon all of the proceedings had before the Court in and the full record of these cases; and this Court having issued its Bench Decision on Motion to Approve Settlement Agreements (the "Bench Decision") on May 20, 2005; and after due deliberation and sufficient cause appearing therefor, it is

FOUND AND DETERMINED THAT:[1]

A. The Court has jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334 and the Standing Order of Referral of Cases to Bankruptcy Court Judges of the District Court for the Southern District of New York, dated July 19, 1984 (Ward, Acting C.J.). The relief requested in the Motion is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

B. Due and proper notice of the Motion was provided as set forth in the Motion, and no other or further notice need be provided.

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[1] This Order incorporates by reference the findings of fact and conclusions of law set forth in the Bench Decision. Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate. *See* Fed. R Bankr. P. 7052.

C. As more fully set forth in the Bench Decision, the Settlement Agreements[2] are fair, equitable and appropriate.

D. The Debtors have demonstrated sound business justification for this Court authorizing the Settlement Agreements.

E. The Settlement Agreements are in the best interests of, and, provide a benefit to, each of the respective Debtors' estates, and should be approved.

F. Payments to be made in connection with the Settlement Agreements are (a) an actual and necessary cost and expense of preserving the Debtors' estates, within the meaning of section 503(b) of the Bankruptcy Code, (b) of benefit to the Debtors' estates, and (c) reasonable and appropriate.

G. The Debtors do not control or own a majority of the shares of Century/ML Cable Venture and Century/ML Cable Corporation (collectively, the "Joint Venture").

H. The entry of this Order is in the best interests of the Debtors and their estates, creditors and interest holders and all other parties in interest herein; and it is therefore

ORDERED, ADJUDGED AND DECREED THAT:

1. The Motion is granted. All objections to the Motion, to the extent not resolved or disposed of by the provisions of this Order or the Bench Decision, are overruled.

2. The Settlement Agreements are approved.

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[2] Capitalized terms used and not otherwise defined herein have the meaning ascribed to them in the Motion.

3. In connection with the Settlement Agreements and the terms of the non-prosecution agreement set forth therein, the Debtors are hereby authorized to obtain ownership to the cable systems currently operated by the Forfeited Managed Entities, by either (a) obtaining title to the equity interests in the Forfeited Managed Entities, (b) obtaining title to the equity interests in the entities that own the equity interests in the Forfeited Managed Entities ("*Intermediate Holding Companies*"), (c) obtaining title to the assets comprising the cable systems currently held by the Forfeited Managed Entities, in which event the Debtors shall contribute such assets to one or more newly formed entities ("*Newcos*" and, together with the Forfeited Managed Entities and the Intermediate Holding Companies, the "*Subject Companies*"), or (d) a combination of the foregoing, provided that the Debtors shall not mix within a single Newco assets corresponding to pledgors under different Co-Borrowing Facilities.

4. Subject to obtaining the requisite consent ("*DIP Consent*") of the lenders under the Debtors' postpetition credit facility (the "*DIP Facility*") and owning the Subject Companies pursuant to and in accordance with the Settlement Agreements (or on such other terms as are acceptable to the Debtors in their sole discretion), the Debtors shall grant to, and, if applicable, shall cause the Subject Companies to grant to (a) the respective administrative agents of the Co-Borrowing Facilities for the benefit of the respective agents and lenders under the Co-Borrowing Facilities, effective as of the date that is immediately prior to the Forfeiture Date, a lien on the equity interests of the Subject Companies that are owned by the Debtors or another Subject Company (the "*Subject Companies Collateral*"), in each case, to secure allowed claims for indebtedness, obligations, and lia-

bilities under the respective Co-Borrowing Facilities (the "*Co-Borrowing Liens*"), it being agreed that (i) each administrative agent is only being granted a lien on the equity interests of a Subject Company to the extent that such administrative agent held a lien on the equity interests of such Subject Company prior to the Forfeiture Date (or, in the case of a Subject Company that is a Newco, to the extent that such administrative agent held a lien on the equity interests of the Forfeited Managed Entity whose assets and properties were transferred to such Newco) and (ii) subject to the foregoing, and the terms of paragraph 8 below, the liens on the Subject Companies Collateral granted pursuant to the terms hereof shall have the same validity, priority, value, scope, effect and, (except as otherwise provided in paragraphs 9 and 13 herein) immunity from avoidance, as such liens had immediately prior to the Forfeiture Date; and (b) Bank of Montreal, as administrative agent, of that certain Co-Borrowing Facility, dated September 28, 2001 (the "*Olympus Facility*"), for the benefit of the agents and lenders under the Olympus Facility, as further security for obligations owed by Coudersport and Bucktail thereunder, a lien (the "*Supplemental Liens*" and, together with the Co-Borrowing Liens, the "*Prepetition Liens*") on all assets and properties (other than equity interests, which are provided for in clause (a) immediately above, the "*Supplemental Collateral*") that are wholly owned by entities in the Olympus Borrower Group (as defined in the DIP Facility) and, as of June 25, 2002 (the "*Petition Date*"), were not subject to a valid, perfected and non-avoidable lien, *provided, however,* that the Supplemental Liens and any amounts realized by the agents and lenders under the Olympus Facility as a result of the granting of such Supplemental Liens shall (i) be subject to any valid lien perfected sub-

sequent to the Petition Date, (ii) have the same validity, priority, scope, effect and (except otherwise provided in paragraphs 9 and 13 herein) immunity from avoidance as the Co-Borrowing Liens under the Olympus Facility have with respect to Bucktail and Coudersport, (iii) be limited to the fair market value of Coudersport and Bucktail (as such value is determined by the Bankruptcy Court), (iv) in all cases, be subject to the terms and conditions set forth in paragraph 8 below, and (v) secure allowed claims for indebtedness, obligations and liabilities under the Olympus Facility.

5. In consideration of the grant of the Supplemental Liens on the Supplemental Collateral, the agents and lenders under the Olympus Facility shall, absent further order of this Court (following notice and a hearing) based solely upon a showing of materially changed circumstances adversely affecting the value of the Supplemental Liens, forbear from exercising any and all rights or remedies against Coudersport or Bucktail or the equity securities representing ownership of Coudersport or Bucktail, whether arising under the terms of the Olympus Facility, applicable law, or otherwise; *provided, however,* that in the event the agents and lenders under the Olympus Facility are subsequently authorized by this Court to exercise any rights or remedies against Coudersport and/or Bucktail and/or the equity securities representing ownership of Coudersport and/or Bucktail, as of the date of such Order, the Supplemental Liens shall automatically be deemed revoked and ineffective.

6. Subject to obtaining DIP Consent and subject to owning the Subject Companies pursuant to and in accordance with the Settlement Agreements (or on such other terms as are acceptable to the Debtors in their sole discretion), the Debtors are hereby authorized to cause each

Subject Company to, and each Subject Company is hereby authorized to, guarantee (or in the case of either a Newco that acquired the assets of a Forfeited Managed Entity that was a borrower under one or more of the Co-Borrowing Facilities prior to the Forfeiture Date or a Subject Company (other than a Newco) that was a borrower under one or more of the Co-Borrowing Facilities prior to the Petition Date, become obligated to pay) the indebtedness, obligations, and liabilities under the applicable Co-Borrowing Facility to the extent (and only to the extent) that such Subject Company provided a guarantee of, or was obligated to pay, the indebtedness, obligations, and liabilities under such Co-Borrowing Facility prior to the Forfeiture Date (and, in the case of a Subject Company that is a Newco, such Newco shall only provide a guarantee of, or become obligated to pay, the indebtedness, obligations, and liabilities under a Co-Borrowing Facility to the extent (and only to the extent) that the Forfeited Managed Entity whose assets and properties were transferred to such Newco provided such a guarantee, or was obligated to pay, prior to the Forfeiture Date). In the event that the equity interests in a Subject Company are held by a Debtor that is not a guarantor or a borrower under the Co-Borrowing Facility to which such Subject Company shall be a guarantor or a borrower (after giving effect to the terms of the immediately preceding sentence), then such Debtor is hereby authorized to guarantee the indebtedness, obligations, and liabilities under the Co-Borrowing Facility to which such Subject Company shall be a borrower or a guarantor (after giving effect to the terms of the immediately preceding sentence); *provided, however,* that the guarantee provided by any such Debtor shall be nonrecourse to such Debtor and shall be limited solely to the value, if any, of the equity interests of the Subject Com-

pany that are held by such Debtor (as determined by the Court) and, in the event that such Debtor holds the equity interests in multiple Subject Companies, the guarantee of the indebtedness, obligations, and liabilities under any such Co-Borrowing Facility provided by such Debtor pursuant to the terms hereof shall not include the value, if any, of the equity interests in any Subject Company that is not a guarantor or a borrower under such Co-Borrowing Facility (after giving effect to the terms of the immediately preceding sentence). The guarantees and obligations provided by the two immediately preceding sentences are referred to herein as the "*Prepetition Guarantees and Obligations.*" The ability of the agents and lenders under the Co-Borrowing Facilities to take any action or seek to enforce any right or remedy with respect to the Prepetition Guarantees and Obligations shall be subject to the terms and conditions set forth in paragraph 8 below.

7. All liens and claims authorized to be granted or given in accordance with paragraphs 4-6 above shall be deemed to have been granted or given prior to the commencement of a bankruptcy case, if any, of or involving the Subject Companies (the "*Subject Companies Petition Date*") or the Debtors (as to the Supplemental Liens and, if applicable, the Prepetition Guarantees and Obligations) and such claims shall not constitute an expense of administration in any such case under title 11 of the United States Code. The Prepetition Liens shall be automatically perfected, effective as of the Forfeiture Date, upon the later of the date of entry of this Order and the date that DIP Consent is obtained. In addition, the Debtors and the Subject Companies shall execute such documentation as the respective administrative agents of the Co-Borrowing Facilities shall reasonably request to evidence and perfect the Prepetition Liens and the

Prepetition Guarantees and Obligations, which documents shall be reasonably satisfactory in all respects to the Co-Lead Arrangers (as defined in the DIP Facility).

8. Notwithstanding anything herein to the contrary, the rights, claims and interests of the lenders and agents under the Co-Borrowing Facilities in respect of the Prepetition Liens, the Prepetition Guarantees and Obligations, the Subject Companies Collateral, the Supplemental Collateral or otherwise shall, in all cases, be subject and subordinate to any and all claims and rights of the agents and lenders under the DIP Facility, in each case, arising under the DIP Facility or the Cash Management Protocol, as amended, which was annexed as Schedule 3 to the Final Order (as defined in the DIP Facility), and the right of the lenders and agents under the Co-Borrowing Facilities to take any action in respect thereof shall be subject to the terms and conditions set forth in all Orders (including, without limitation, the Interim Order, the Final Order and the Extension Order (as each such capitalized term is defined in the DIP Facility)), which were previously entered by this Court in the Debtors' chapter 11 cases (the "*Cases*").

9. This Order and the implementation of the Settlement Agreements is without waiver of, and shall not prejudice or affect the rights, claims or defenses of any party (including any lender, agent, committee, stakeholder, debtor, or estate) in any manner, in law or equity with respect to: (a) any request for relief (which shall be commenced by the Debtors by motion initiating a contested matter) seeking to allocate between or among any or all of the Debtors (i) the financial cost to be borne under the Settlement Agreements and (ii) after giving effect to the liens and claims authorized and granted in decretal paragraphs 4, 6 and 12 herein in favor of the

administrative agents under the Co-Borrowing Facilities, the benefits of the Settlement Agreements (the "Allocation Motion" and the issues referenced in clause 9(a) above, the "Allocation Issues"); provided, however, the Debtors shall have the burden of showing that such allocation satisfies applicable legal principles, including, but not limited to, section 1129 of the Bankruptcy Code (to the extent applicable); provided, further, however, that nothing in this Order shall prejudice any rights of a party in interest to oppose such allocation or to propose a different allocation; provided, further, however, that no order entered with respect to the Allocation Motion shall render this Order interlocutory or in any way affect the finality of this Order, (b) in the absence of this Court's prior determination of the Allocation Issues, any provision of a plan of reorganization for or involving the Debtors that operates to allocate between or among any or all of the Debtors the costs and benefits referenced in clause 9(a)(i) and (ii) above; and (c) the prosecution or defense of any litigation against any of the agents and/or lenders under the Co-Borrowing Facilities (or their respective investment banking affiliates that are defendants in the Committee Litigation (as defined below)) pending in this Court, including the adversary proceeding captioned *Official Committee of Unsecured Creditors for Adelphia Communications Corporation, et al. vs. Bank of America, N.A. et al.*, Ad. Pro. No. 03-04942 (REG), including the proposed intervenor complaint filed by the Equity Committee, which was commenced on July 6, 2003 (the "*Committee Litigation*"), as to which the Settlement Agreements shall be neutral, and shall not operate to reduce, limit or increase damages recoverable therein; *provided, however,* that the parties to the Committee Litigation may claim the Debtors' $715 million contribution to a Government restitution

fund pursuant to the Settlement Agreements as evidence of damages or mitigation of damages, recoverable as a matter of law or equity; which shall in no way constitute an admission or acknowledgement with respect thereto by any of the defendants to the Committee Litigation; *provided, further, however,* that all such parties are forever estopped from seeking to void, avoid or recover transfers of consideration, entities or assets effectuated pursuant to or in contemplation of the Settlement Agreements on the basis that such transfers are fraudulent transfers pursuant to chapter 5, subchapter III, of the Bankruptcy Code; *provided, further, however,* that unless otherwise ordered by the Court in connection with a motion or objection prosecuted by any party in interest (in each case, over the Debtors' opposition) or a ruling in the Committee Litigation (any such order or ruling, a "Contrary Order"), the Debtors agree not to reserve, withhold or escrow plan distributions otherwise payable under a plan of reorganization to any holder of claims under the Pre-Petition Facilities (as such term is defined in the DIP Facility) by reason of the pendency of the Committee Litigation or based on any claim, cause of action or objection asserted by any party in interest on behalf of the Debtors' estates that is based substantially on the allegations set forth in the proposed complaint underlying the Committee Litigation (provided, that, any plan of reorganization proposed by the Debtors shall so reserve, withhold or escrow such plan distributions if required by a Contrary Order); and; *provided, further, however,* without limiting the generality of the foregoing, absent agreement of TCI California Holdings, LLC and TCI Adelphia Holdings, LLC or further order of this Court following notice and a hearing, the financial costs of the Settlement Agreements shall not be charged or allocated to Century-TCI California Communications,

L.P., Western NY Cablevision, L.P., Parnassos Communications, L.P. or any of their subsidiaries.

10. In accordance with the Bench Decision, the parties in interest who wish to take a position on the Allocation Issues shall caucus amongst themselves and professionals for the Debtors and the Creditors' Committee on an expeditious basis in order to determine a process for the prompt resolution, or (if necessary) a determination of any dispute by this Court, of the Allocation Issues. Subject to the provisions of decretal paragraphs 9 and 10 hereof, the Debtors shall be permitted to propose a non-binding resolution of the Allocation Issues in order to draft and file a proposed plan of reorganization and disclosure statement.

11. Notwithstanding anything contained in this Order to the contrary, upon obtaining the ownership interests in the Subject Companies, the Debtors need not establish an entitlement to, or demonstrate that they have satisfied the elements of, the doctrine of subrogation (whether arising under state or federal law) to maintain or establish ownership of the Subject Companies.

12. All proofs of claim timely filed by lenders or agents under the Co-Borrowing Facilities, solely in their capacity as such lenders or agents, or thereafter permitted to be filed by such parties (solely in their capacity as lenders or agents of such facilities), shall automatically be deemed to have been timely filed against the Subject Companies as of the Subject Companies Petition Date.

13. As of the Subject Companies Petition Date, all Orders previously entered by this Court in the Cases (including, without limitation, the Interim Order, the Final Order, the Extension Order, and all provisions

relating to the adequate protection of the lenders or agents under the Co-Borrowing Facilities contained therein (collectively, the "*DIP Orders*")), to the extent applicable and in a manner that is consistent with such Orders' stated purposes, shall be deemed to apply to the bankruptcy cases commenced by one or more of the Subject Companies, effective as of the date of the entry of such Order, as if the Subject Companies were Debtors referred to in said Orders; *provided, however,* that all rights, claims, requests for relief, defenses and causes of action of the parties to the Committee Litigation shall automatically be deemed to apply to the Subject Companies without regard to any procedural requirement or deadline established by the DIP Orders.

14. The Debtors are authorized and empowered to cancel or otherwise retire, upon and following the occurrence of the Forfeiture Date, at such time and in such manner as the Debtors determine in their sole discretion, the debt and/or equity securities issued by Adelphia that are included in the Forfeited Assets pursuant to the Settlement Agreements; *provided, however,* that any such cancellation of debt securities included in the Forfeited Assets (the "Forfeited Debt Securities") shall be without prejudice (a) to the right of any holder of senior indebtedness issued by Adelphia Communications Corporation to assert that such Forfeited Debt Securities be deemed to remain outstanding for purposes of enforcing the subordination provisions contained in any Forfeited Debt Securities in connection with any plan distributions that otherwise would be made on account of such securities, or (b) the rights, claims or defenses of any party in interest (including the Debtors) to object to any such request; and *provided further, however,* that any such cancellation of debt or equity securities included in the Forfeited Assets (the "Forfeited Securities") shall be without prej-

udice (x) to the right of any party in interest to assert that such Forfeited Securities be deemed to remain outstanding for purposes of any plan distributions that otherwise would be made on account of such securities, or (y) the rights, claims or defenses of any party in interest (including the Debtors) to object to any such request.

15. Notwithstanding anything herein to the contrary, this Order is without prejudice to, and shall not constitute a waiver of, either (i) the rights of the City of Carlsbad, California and the County of San Diego, California (collectively, the "LFAs"), if any, to approve any future transfer requests and/or franchise renewal proceedings related to franchise agreements with one or more of the Forfeited Managed Entities or their successors, including, but not limited to, the right, if any, to consider issues of noncompliance that presently exist and/or to assert the need to cure any existing noncompliance issues (each as contractually or otherwise permitted), or (ii) any of the Debtors' rights and defenses related to section (i) of this paragraph, including, but not limited to, the right to argue that pursuant to section 365(f) of the Bankruptcy Code or otherwise that a LFAs' consent is not required to transfer a franchise agreement.

16. The Joint Venture shall be excluded from the definition of "subsidiaries" as used in the Rigas/Adelphia Agreement or the DoJ/Adelphia Agreement. Except as they relate to any derivative claims of Adelphia, references in the Settlement Agreements to entities "asserting claims through or on behalf of Adelphia" shall exclude the Joint Venture.

17. The Debtors are authorized and empowered to take such steps, expend such sums of money, and do such other things as may be necessary to implement and

effectuate the terms and provisions of this Order and the Settlement Agreements.

18. Notwithstanding Bankruptcy Rule 6004(g), this Order shall not be stayed for ten (10) days after the entry hereof and shall be effective and enforceable immediately upon signature hereof.

19. In the event of any inconsistency between this Order and the Settlement Agreements, this Order shall govern.

20. This Court shall retain jurisdiction over any matters related to or arising from the implementation of this Order and the Settlement Agreements.

Dated: May 26, 2005

s/ Robert E. Gerber
HONORABLE ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

No. 02-41729 (REG)
June 13, 2005

IN RE ADELPHIA COMMUNICATIONS CORP., *et al.*,

Debtors.

Willkie Farr & Gallagher LLP, by Marc Abrams, Esq. (argued), Paul V. Shalhoub, Esq., Brian E. O'Connor, Esq., Terence K. McLaughlin, Esq., Rachel C. Strickland, Esq., Morris J. Massel, Esq., Jamie M. Ketten, Esq., New York, NY, Boies, Schiller & Flexner LLP by Philip C. Korologos, Esq. (argued), George Carpinello, Esq., Eric Brenner, Esq., Armonk, NY, Covington & Burling by Alan Vinegrad, Esq., New York, NY, Foley & Lardner LLP, by Gregory S. Bruch, Esq., Washington, D.C., for Debtors and Debtors in Possession.

David N. Kelley, United States Attorney, by Richard D. Owens, Assistant United States Attorney, Christopher J. Clark, Assistant United States Attorney (argued), Judd C. Lawler, Assistant United States Attorney, New York, NY.

Dilworth Paxson LLP, by Lawrence G. McMichael, Esq. (argued), Martin J. Weis, Esq., Philadelphia, PA, Brown Raysman Millstein Felder & Steiner LLP, by Ger-

ard S. Catalanello, Esq., Shannon R. Wing, Esq., New York, NY, for the Rigases.

Kasowitz, Benson, Torres & Friedman LLP, by David M. Friedman, Esq. (argued), Adam L. Shiff, Esq., Jonathan E. Minsker, Esq., New York, NY, for the Official Committee of Unsecured Creditors.

Bragar Wexler Eagel & Morgenstern, P.C., by Peter D. Morgenstern, Esq. (argued), Gregory A. Blue, Esq., Eric B. Fisher, Esq., Andrew Buck, Esq., New York, NY, for the Official Committee of Equity Security Holders.

Hennigan, Bennett & Dorman LLP, by Bruce Bennett, Esq. (argued), James O. Johnston, Esq., Los Angeles, CA, by A. Brent Truitt, Esq., New York, NY, for the Ad Hoc Committee of ACC Senior Noteholders.

Seward & Kissel LLP, by Arlene R. Alves, Esq., New York, NY, for Law Debenture Trust Company of New York, as ACC Senior Notes Trustee.

Brown Rudnick Berlack Israels LLP, by Edward S. Weisfelner, Esq., New York, NY, by Steven D. Pohl, Esq. (argued), Boston, MA, for the Ad Hoc Adelphia Trade Claims Committee.

White & Case LLP, by J. Christopher Shore, Esq. (argued), Douglas P. Baumstein, Esq., New York, NY, by Thomas E. Lauria, Esq., John K. Cunningham, Esq., Gerard Uzzi, Esq., Miami, FL, for the Ad Hoc Committee of Arahova Noteholders.

Andrews Kurth LLP, by Peter S. Goodman, Esq. (argued), Justin R. Wyatt, Esq., New York, NY, by Hugh M. Ray, Esq., Houston, TX, for the Ad Hoc Committee of Senior Preferred Shareholders.

Fried Frank Harris Shriver & Jacobson LLP, by Gregg L. Weiner, Esq., Gary Kaplan, Esq. (argued), Craig M.

Price, Esq., New York, NY, for W.R. Huff Asset Management Co., L.L.C.

Sheppard Mullin Richter & Hampton LLP, by David McCarty, Esq., Los Angeles, CA, for U.S. Bank National Association, as Indenture Trustee in Respect of the Arahova Notes and the FrontierVision Notes.

Chapman and Cutler LLP, by James E. Spiotto, Esq., Ann Acker, Esq., Chicago, IL, for the Certain FrontierVision Noteholders.

Emmet, Marvin & Martin, LLP, by Edward P. Zujkowski, Esq., Martin Eisenberg, Esq., New York, NY, for The Bank of New York, as Indenture Trustee.

Haynes and Boone, LLP, by Judith Elkin, Esq., Glenn M. Kurtz, Esq., Karen M. Asner, Esq., New York, NY, by Thomas E. Kurth, Esq., Robin E. Phelan, Esq. (argued), Richard Anigian, Esq., Dallas, TX, for Bank of America, N.A.

Mayer, Brown, Rowe & Maw LLP, by J. Robert Stoll, Esq., Robert J. Ward, Esq., Kenneth E. Noble, Esq. (argued), New York, NY, for Bank of Montreal, as Administrative Agent for the Olympus Lenders.

Simpson Thacher & Bartlett LLP, by Peter Pantaleo, Esq. (argued), William T. Russell, Jr., Esq. (argued), New York, NY, for Wachovia Bank, N.A., as Administrative Agent for the UCA Lenders.

Milbank, Tweed, Hadley & McCloy LLP, by Luc A. Despins, Esq., New York, NY, for Citibank, N.A., as Administrative Agent for the Century-TCI Lenders.

Milbank, Tweed, Hadley & McCloy LLP, by James C. Tecce, Esq., New York, NY, for JPMorgan Chase Bank, as Administrative Agent for the FrontierVision Lenders.

Luskin, Stern & Eisler LLP, by Michael Luskin, Esq., Trevor Hoffmann, Esq., New York, NY, for The Bank of Nova Scotia.

Cleary Gottlieb Steen & Hamilton LLP, by Mitchell A. Lowenthal, Esq. (argued), New York, NY, for 13 Investment Banks.

Chadbourne & Parke LLP, by Andrew P. Brozman, Esq., New York, NY, for Credit Lyonnais New York Branch, Credit Lyonnais Securities (USA) Inc., and LCM I Limited Partnership.

Ballard Spahr Andrews & Ingersoll, LLP, by William Slaughter, Esq. (argued), Philadelphia, PA, for Comcast.

Morgan, Lewis & Bockius LLP, by Richard S. Toder, Esq. (argued), Neil E. Herman, Esq., New York, NY, for Century/ML Cable Venture.

Proskauer Rose LLP, by Bradley I. Ruskin, Esq. (argued), Jeffrey Levitan, Esq., Scott A. Eggers, Esq., Karen Coombs, Esq., New York, NY, for ML Media Partners, L.P.

Angel & Frankel, P.C., by Joshua J. Angel, Esq., Laurence May, Esq. (argued), John H. Drucker, Esq. (argued), Leonard H. Gerson, Esq., Kirby McInerney & Squire LLP, by Richard L. Stone, Esq., Mark A. Strauss, Esq., Abbey Gardy, LLP, by Arthur N. Abbey, Esq., Judith L. Spanier, Esq., Stephen T. Rodd, Esq., Richard B. Margolies, Esq., New York, NY, for Consolidated Class Action Plaintiffs.

Rutan & Tucker, LLP, by William M. Marticorena, Esq., Costa Mesa, CA, for the County of San Diego, California.

Miller & Van Eaton, LLP, by Kenneth A. Brunetti, Esq., San Francisco, CA, by William Malone, Esq., Washington, D.C., for the City of Carlsbad, California.

DECISION ON MOTION FOR RECONSIDERATION OF ORDER APPROVING SETTLEMENT AGREEMENTS

ROBERT E. GERBER, Bankruptcy Judge.

The Creditors' Committee, joined by certain unsecured creditors, moves, pursuant to Fed.R.Civ.P. 59 and 60(b), as made applicable to bankruptcy cases under Fed. R. Bankr.P. 9023 and 9024, for reconsideration of this Court's order approving the Debtors' settlement with the DoJ, SEC, and the Rigases, based on developments since this Court issued its May 20 decision. Reconsideration is granted, but the Court's earlier decision is adhered to.

I.

The parties debate, as a threshold matter, whether this Court has jurisdiction to consider the Creditors' Committee's motion, as the Creditors' Committee had already appealed from the order that is the subject of this motion. The Creditors' Committee contends that the Court does have jurisdiction, and the Court agrees. Here relief was sought under Bankruptcy Rule 9023 and 9024, within 10 days of the order that had been appealed from. Under such circumstances, this Court is comfortable that under Fed. R. Bankr.P. 8002(b), which was amended in 1994 to conform to 1993 amendments to Rule 4(a)(4) of

the Federal Rules of Appellate Procedure,[1] and caselaw determined after the 1993 amendments to FRAP 4(a)(4),[2] the Court does have jurisdiction.[3]

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[1] *See* Advisory Comm. Note to 1994 Amendment to Fed. R. Bankr.P. 8002 ("This rule as amended provides that a notice of appeal filed before the disposition of a specified postjudgment motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions . . . is, in effect, suspended until the motion is disposed of. . . .").

[2] *See Stone v. INS*, 514 U.S. 386, 396, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995) ("[T]he filing of a Rule 59 motion to alter or amend a district court's judgment strips the appellate court of jurisdiction, whether the Federal Rule of Civil Procedure 59 motion is filed before *or after* the notice of appeal.") (emphasis added); *Jones v. O'Keefe*, 2000 WL 1804153 (S.D.N.Y. Dec.7, 2000) (Casey, J.) at *2 (court retained jurisdiction to decide a Rule 59(e) motion even though a notice of appeal from the same order had been filed the day before); *Woodard v. Hardenfelder*, 845 F.Supp. 960, 965 (E.D.N.Y.1994) (Glasser, J.) (noting change in FRAP 4(a)(4) to avoid trap for the unwary, and to provide that a notice of appeal filed before the filing of one of the specified motions—including Fed.R.Civ.P. 59 and 60—"is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals.").

[3] Accordingly, the Court does not have to consider the possible alternative ground, applied in cases in the Second Circuit involving 60(b) motions made outside the 10-day window where FRAP 4(a)(4) and Fed. R. Bankr.P. 9002(b) would provide protection, that could also justify jurisdiction given the outcome of this determination—that the lower court has jurisdiction to *deny* a motion for reconsideration, even though it would need leave from the appellate court to *grant* it. *See Toliver v. County of Sullivan*, 957 F.2d 47 (2d Cir.1992); *Travelers Casualty & Surety Co. v. Crow & Sutton Assocs.*, 228 F.R.D. 125, 127 (N.D.N.Y.2005) (Sharpe, J.) ("[A] rule 60(b) motion can be made even though an appeal has been taken and is pending. . . . In the Second Circuit, a district court can either entertain and deny the rule 60(b) motion without the circuit court's per-

Then, though the Court has considerable doubt as to whether reconsideration is appropriate under Fed. R. Bankr.P. 9024 and Fed.R.Civ.P. 60(b), it may plausibly be argued that the May 31 issuance by the United States Supreme Court of its decision in *Arthur Andersen LLP v. United States,*[4] and statements by the DoJ in its June 3 argument before the Second Circuit—both after the issuance of this Courts May 20 decision—provide a reasonable basis for assertions that they give rise to a "change in the law or the facts" upon which this Court made its decision, which has been held under at least some of the law construing Fed. R. Bankr.P. 9023 and Fed.R.Civ.P. 59(a) to be a satisfactory basis for reconsideration.[5] The Court assumes, without deciding, that these contentions are sufficient to permit consideration of their merits.

II.

However, upon reexamining its decision in light of the matter the Creditors' Committee proffers, the Court sees nothing to cause it to conclude that it made a "clear error of law,"[6] or that there was a change in the controlling law, or that the facts have materially changed.

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mission, or grant a rule 60(b) motion after an appeal is taken . . . if the moving party obtains permission from the circuit court.") (internal quotation marks and citations omitted; quoting, *inter alia*, *Toliver*).

[4] 544 U.S. 696, 125 S.Ct. 2129, 161 L.Ed.2d 1008 (2005) ("*Arthur Andersen* ").

[5] *See In re Midland Mechanical Contractors, Inc.*, 200 B.R. 453, 456 (Bankr.N.D.Ga.1996) (Drake, J.) (articulating the standard in that fashion).

[6] *See Tallo v. Gianopoulos*, 321 B.R. 23, 27 (E.D.N.Y.2005) (Sifton, J.).

Changes in the Controlling Law

Plainly there has been no change in the controlling law with respect to the standards to be applied by a bankruptcy court in determining whether or not to approve a settlement. Nor did the issuance of *Arthur Andersen* result in a material change—assuming there was any change at all—in the law that would have been taken into account by the Debtors in deciding whether or not to settle, or by the Court in deciding whether the Debtors' settlement was in the best interests of the estate.

While *Arthur Andersen* had not come down when this Court's May 20 decision approving the settlement was issued, this Court did not then rule as it did based on an expectation that Arthur Andersen's conviction would stand. Indeed, widely disseminated reports of the April oral argument at the Supreme Court had led this Court then to suspect that a reversal by the Supreme Court of Arthur Andersen's conviction was likely. This Court's May 20 decision was based not on the likelihood that Adelphia would be convicted if indicted, but rather on the damage that an indictment itself would inflict, even with a subsequent acquittal. Even an indictment would result in grave damage to the company, and (among many other things) material risk to Adelphia's now-pending sale to Time-Warner and Comcast, and risk the loss of DIP financing.[7]

Nor does language in *Arthur Andersen*—including, without limitation, on page 2134 of the slip opinion, to which the Creditors' Committee cites—require this Court to rule in a way different than it did. *Arthur Andersen* was in essence a case about defective jury

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[7] *See In re Adelphia Communications Corp.*, 327 B.R. 143, 160-61, 2005 WL 1212601 (Bankr.S.D.N.Y. May 20, 2005) ("*Decision*") at *15.

instructions[8]—most significantly, as to the requisite mens rea of the people who acted on the defendant company's behalf.[9] At this point there is little reason to believe, after the John and Timothy Rigas guilty verdicts, that the Government would have similar problems in that regard. *Arthur Andersen* does not speak to the fairness or unfairness of convicting a corporation based on the acts of the live people who are a company's agents. Nothing in *Arthur Andersen* takes away the Government's right to indict, or ability to convict, corporations in cases where the live people acting on those corporations' behalf act with the requisite mens rea—a matter that was deficient in *Arthur Andersen*, but that might not be deficient in another case.

Thus the Court is constrained to disagree with the Creditors' Committee's broad statement, citing to page 2134 of the slip opinion, that *Arthur Andersen* "makes clear that a company may not be convicted where the wrongdoing is not intentional and pervasive, and that the acts of a few cannot be imputed to a corporation that otherwise lacks criminal intent."[10] *Arthur Andersen* makes clear that wrongdoing must be intentional, but that is as far as it goes. The portion beyond that may be what the law already is, and may be what the law should be, but it is not what *Arthur Andersen* announced, on page 2134 or otherwise.

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[8] *See, e.g., Arthur Andersen* slip opinion at 2135 ("[T]he jury instructions here were flawed in important respects.").

[9] *See Arthur Anderson* slip opinion at 2134 (in two places). *See also id.* at 2134 ("Only persons conscious of wrongdoing can be said to 'knowingly . . . corruptly persuad[e].' ") (brackets in original); *id.* ("[T]he jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing.").

[10] Motion at 8.

New Facts

Nor can the Court agree that the facts have materially changed since this Court's May 20 decision, by reason of statements by the Government at its June 3 argument before the Second Circuit.

With a significant caveat,[11] the Court is inclined to agree with the Creditors' Committee's suggestion that when addressing the Second Circuit, the Government acknowledged weaknesses as to its forfeiture claims that Government negotiators did not acknowledge when negotiating with Adelphia representatives. And given its statements to the Circuit, it is likely that when the Government stated to Adelphia's Dean Kronman and others on Adelphia's negotiating team, with little in the way of qualifications or reservations,[12] "we will prevail,"[13] the

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[11] The Court notes that caveat because the Government properly observes that the Creditors' Committee did not quote the highly relevant comments that Judge Sotomayor expressed at page 17 of the argument transcript, and did not quote the questions by Judge Sotomayor (at pages 43-44 of the transcript) to which the Government was responding when the Government was quoted at pages 44-46 of the transcript. And the Government's response, fairly read in full context, probably should be regarded as based in material part on its recognition of (1) the apparent strength of the banks' position with respect to their liens on the Rigas Family Entities, and (2) difficulties in securing forfeiture of the interests held by non-convicted Rigases in Rigas Family Entities—both of which would cause problems for the Government, but which would not necessarily ensure to Adelphia's benefit.

[12] The Court does note that the Government also stated that "we will stretch it out until the end of time if necessary," implying a recognition that the Government might not prevail in earlier stages of any litigation.

[13] *See* Motion at 7-8, n. 3.

Government was stating its likelihood of success with materially greater assurance than it privately believed.

But these points ultimately are immaterial. In approving the settlement, this Court did not rely on the Government's self-serving statements to Adelphia as to the Government's likelihood of success. Puffery as to the strength of one's litigation position in settlement negotiations is not unheard of, and those on the receiving end of others' litigation predictions tend not to automatically take them at face value. In approving the settlement, this Court did not assume that the Government necessarily would prevail in its forfeiture claims (nor did Adelphia or anyone else argue that this Court should), even with respect to forfeiture claims that might relate to property beneficially owned by soon to be sentenced John and Timothy Rigas. Rather, as stated in its decision, this Court found that there were *risks* that the Government might prevail;[14] there were *risks* as to Adelphia's ability to prevail on its own constructive trust claims, particularly with respect to interests in Rigas Family Entities held by persons other than John, Timothy, Michael and James Rigas (which Adelphia likely would need to do to

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[14] *See Decision* at 153, 2005 WL 1212601, at *7 (finding reasonable Board's conclusions, after having been informed that Adelphia had arguments it could make against forfeiture, that Adelphia's prospects of prevailing were uncertain at best, and that there was "a very real risk" that Adelphia's arguments would be unavailing); *id.* at 160, 2005 WL 1212601, at *14 (settlements would ensure that the Debtors' estates would include hundreds of millions of dollars of Forfeited Managed Entities, "title to which otherwise might only be obtainable by winning hard fought litigation against the Rigases and defeating competing claims to these assets by, for example, the Government and creditors of the Rigas Family").

trump Government forfeiture rights);[15] and *risks* as to Adelphia's ability to prevail on constructive trust claims quickly on summary judgment, as contrasted to prevailing only on damages claims, and only after an ultimate trial.[16] The assessments by Adelphia's Board, and by the Court, of the risks to Adelphia with respect to forfeiture trump the assessments by the Government (as articulated to anyone or as privately held) with respect to the potential outcome as to that issue.

Finally, but significantly, the risks with respect to the forfeiture of the Rigas Family entities were but one factor in the Court's consideration of the totality of factors considered by the Court in approving the settlement.

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[15] *See id.* at 162, 2005 WL 1212601, at *17 ("But whether Adelphia could win quickly, such as on its motion for summary judgment, and on its constructive trust claim, which is simultaneously more important to prevail on and difficult to show, is a closer question."); *id.* at 168, 2005 WL 1212601, at *22 ("And success on Adelphia's part on the constructive trust claim would be of considerable importance, because if Adelphia merely secured a money judgment against the Rigases, that might well not trump the DoJ's property interest in forfeited property."). *See also* n. 16 below.

[16] *See id.* at 168, 2005 WL 1212601, at *22 ("I regard it as likely—strongly likely—that Adelphia would ultimately prevail over the Rigases on Adelphia's common law claims, especially those for breach of fiduciary duty. But whether Adelphia could prevail quickly, on summary judgment, and especially on its constructive trust claim, is much more debatable, by reason of the heavy burdens in this and every other Circuit to obtain victory on summary judgment; by reason of the demanding requirements for the imposition of a constructive trust; and because of the difficulty of securing summary judgment against *each* of the persons or entities who had an interest in the Forfeited Assets, and not just John, Timothy and even Michael and James Rigas.") (emphasis in original).

They were neither the overriding factor nor the factor that tipped the scales in an otherwise close balance.

The decision is adhered to.

SO ORDERED.

Federal Rules of Bankruptcy Procedure, Rule 9019

Rule 9019. Compromise and Arbitration

(a) Compromise

On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

(b) Authority to compromise or settle controversies within classes

After a hearing on such notice as the court may direct, the court may fix a class or classes of controversies and authorize the trustee to compromise or settle controversies within such class or classes without further hearing or notice.

(c) Arbitration

On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration.

11 U.S.C.A. § 507

§ 507. Priorities

(a) The following expenses and claims have priority in the following order:

(1) First:

(A) Allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.

(B) Subject to claims under subparagraph (A), allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition, are assigned by a spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative to a governmental unit (unless such obligation is assigned voluntarily by the spouse, former spouse, child, parent, legal guardian, or responsible relative of the child for the purpose of collecting the debt) or are owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the fil-

ing of the petition be applied and distributed in accordance with applicable nonbankruptcy law.

(C) If a trustee is appointed or elected under section 701, 702, 703, 1104, 1202, or 1302, the administrative expenses of the trustee allowed under paragraphs (1)(A), (2), and (6) of section 503(b) shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for the payment of such claims.

(2) Second, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

(3) Third, unsecured claims allowed under section 502(f) of this title.

(4) Fourth, allowed unsecured claims, but only to the extent of $10,950[1] for each individual or corporation, as the case may be, earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for—

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the

[1] Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor.

(5) Fifth, allowed unsecured claims for contributions to an employee benefit plan—

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of—

(i) the number of employees covered by each such plan multiplied by $10,950[1]; less

(ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

(6) Sixth, allowed unsecured claims of persons—

(A) engaged in the production or raising of grain, as defined in section 557(b) of this title, against a debtor who owns or operates a grain storage facility, as defined in section 557(b) of this title, for grain or the proceeds of grain, or

(B) engaged as a United States fisherman against a debtor who has acquired fish or fish produce from a fisherman through a sale or conversion, and who

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[1] Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

is engaged in operating a fish produce storage or processing facility—

but only to the extent of $5,400[1] for each such individual.

(7) Seventh, allowed unsecured claims of individuals, to the extent of $2,425[1] for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for—

(A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition—

(i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days before the date of the filing of the petition, exclusive of—

(I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings against collections was in effect

[1] Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

in a prior case under this title during that 240-day period, plus 90 days.

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax incurred before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (4) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on—

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise—

(i) entered for consumption within one year before the date of the filing of the petition;

(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisement or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

An otherwise applicable time period specified in this paragraph shall be suspended for any period during which a governmental unit is prohibited under applicable nonbankruptcy law from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection action taken or proposed against the debtor, plus 90 days; plus any time during which the stay of proceedings was in effect in a prior case under this title or during which collection was precluded by the existence of 1 or more confirmed plans under this title, plus 90 days.

(9) Ninth, allowed unsecured claims based upon any commitment by the debtor to a Federal depository

institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution.

(10) Tenth, allowed claims for death or personal injury resulting from the operation of a motor vehicle or vessel if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance.

(b) If the trustee, under section 362, 363, or 364 of this title, provides adequate protection of the interest of a holder of a claim secured by a lien on property of the debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection (a)(2) of this section arising from the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363 of this title, or from the granting of a lien under section 364(d) of this title, then such creditor's claim under such subsection shall have priority over every other claim allowable under such subsection.

(c) For the purpose of subsection (a) of this section, a claim of a governmental unit arising from an erroneous refund or credit of a tax has the same priority as a claim for the tax to which such refund or credit relates.

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(1), (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), or (a)(9) of this section is not subrogated to the right of the holder of such claim to priority under such subsection.

11 U.S.C.A. § 510

§ 510. Subordination

(a) A subordination agreement is enforceable in a case under this title to the same extent that such agreement is enforceable under applicable nonbankruptcy law.

(b) For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under *section 502* on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

(c) Notwithstanding subsections (a) and (b) of this section, after notice and a hearing, the court may—

(1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or

(2) order that any lien securing such a subordinated claim be transferred to the estate.

11 U.S.C.A. § 1129

§ 1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

(5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—

(A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive—

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash—

(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that

term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(14) If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.

(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan—

> **(A)** the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
>
> **(B)** the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

(16) All transfers of property of the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

> **(b)(1)** Notwithstanding section 510(a) of this title, if all of the applicable requirements of sub-

section (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides—

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the

treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

(C) With respect to a class of interests—

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or

retain under the plan on account of such junior interest any property.

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

(e) In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).

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IN THE

Supreme Court of the United States

IN RE: ADELPHIA COMMUNICATIONS CORPORATION, *et al.*,

Debtors.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS
and W.R. HUFF ASSET MANAGEMENT CO., LLC,

Petitioners,

—v.—

ADELPHIA COMMUNICATIONS CORPORATION AND ITS AFFILIATED DEBTORS AND DEBTORS-IN-POSSESSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Second Circuit properly dismissed Petitioners' appeal (the "Appeal") as equitably moot after determining that, under all of the facts and circumstances, it would be inequitable and impracticable to grant the relief requested?

2. Whether the United States Court of Appeals for the Second Circuit was required to address the merits of Petitioners' arguments in order to determine whether to dismiss Petitioners' appeal as equitably moot?

3. Whether the United States Court of Appeals for the Second Circuit could have granted Petitioners the relief they sought had it not dismissed Petitioners' appeal as equitably moot?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, the undersigned counsel for Respondents Adelphia Communications Corporation ("Reorganized ACC") and its affiliated reorganized debtors (collectively, the "Reorganized Debtors") certifies that:

a. Reorganized ACC's sole stockholder is ACC Stock Distribution Trust (the "Distribution Trust"), which is not a corporation and is not publicly traded;

b. Many of the Reorganized Debtors have ceased to exist or are in the process of being merged and/or dissolved;

c. Those Reorganized Debtors that still exist are not publicly traded corporations and have no corporate parent (other than Reorganized ACC itself, which is a Respondent and is not publicly traded); and

d. No publicly held corporation owns 10% or more of Reorganized ACC's or any of the Reorganized Debtors' stock.

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SUMMARY OF REASONS TO DENY THE PETITION

The Petition represents Petitioners' eighth attempt over the last two years to attack and unwind a complex and contentiously negotiated four-way settlement among Adelphia Communications Corporation and its affiliated debtors (the "Debtors" or "Respondents"), the United States Department of Justice ("DoJ"), the Securities and Exchange Commission ("SEC," and together with the DoJ, the "Government") and members of the Rigas family (the "Settlement"). The Settlement yielded extremely valuable benefits to the Debtors and all of their stakeholders and has been approved by every court that has reviewed it.[1]

In order to obtain this Court's review of the Settlement, Petitioners conjure up the specter of a conflict among the Circuits in the application of the doctrine of "equitable mootness." No such conflict exists, however. Each Circuit conducts a case-by-case analysis of the facts and circumstances presented on appeal and applies similar if not identical factors to each appellate claim to determine whether it is possible to render effective relief to the appellant on any of its claims. Although the Circuits may at times use different terminology, such as the Seventh Circuit, which has discarded the term "equitable mootness," they each

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[1] Petitioners have challenged the Settlement twice in the United States Bankruptcy Court for the Southern District of New York before the Honorable Robert E. Gerber, on appeal in the United States District Court for the Southern District of New York before the Honorable Lewis Kaplan, on further appeal in the United States Court of Appeals for the Second Circuit, then requesting *en banc* review by the Second Circuit and now before this Court. In addition, Petitioners also challenged the Settlement in the United States District Court for the Southern District of New York before the Honorable Leonard B. Sand (who approved a related component of the Settlement) and again in the Second Circuit in connection with a mandamus petition following Petitioners' unsuccessful challenge before Judge Sand.

employ the same jurisprudential concepts in dismissing appeals when it would be inequitable to grant relief to the appellant.

Here, the United States Court of Appeals for the Second Circuit (the "Second Circuit") determined that affording the relief Petitioners requested would be inequitable and impracticable because, in reliance on the un-stayed Order approving the Settlement, the parties substantially performed their respective obligations under the Settlement. Such performance included, among other things, causing assets valued at nearly $1 billion to be forfeited by the Rigases to the Government, conveyed by the Government to the Debtors and, in turn, irretrievably sold by the Debtors to Time Warner NY Cable LLC ("TWC") and Comcast Corporation (collectively, the "Buyers") in a sale pursuant to section 363 of the Bankruptcy Code (the "363 Sale"). Because, by operation of section 363(m) of the Bankruptcy Code, those assets cannot now be recovered from the Buyers, the Second Circuit properly recognized that there would be no practicable way to return the parties to their pre-settlement positions even if it had reached the merits of the Appeal.

The Second Circuit also rejected Petitioners' argument (repeated in the Petition here) that effective relief could be granted by simply reforming the Settlement to excise the Government's discretion to administer the Restitution Fund. Recognizing that it lacked the authority to "blue-pencil" the Settlement, the Second Circuit properly observed that it would be "grossly inequitable" to deny the Government "the benefits of their bargains" by rewriting the Settlement as Petitioners requested.[2] Because the Second Circuit would have had no alternative other than to unwind the entire Settlement if it found Petitioners' argu-

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[2] *See In re Adelphia Comme'ns. Corp.*, 2006 WL 3826700, *1 (2d Cir. Dec. 26, 2006).

ments to have merit, the Debtors believed, and continue to believe, that it is in their interest to oppose the Appeal rather than risk the inequity and chaos that could result from a ruling in Petitioners' favor.

Since the Second Circuit's dismissal of the Appeal, the mootness of the Appeal has been compounded by the confirmation of the Debtors' Fifth Amended Joint Chapter 11 Plan of Reorganization (the "5th Amended Plan") on January 3, 2007 and its substantial consummation on or about February 12, 2007. The substantial consummation of the 5th Amended Plan makes it impossible for any court to fashion relief as the Debtors' assets have now been substantially distributed and the Debtors have essentially ceased to exist. Billions of dollars in cash, TWC stock and other consideration has been distributed to tens of thousands of stakeholders, many of whom have likely since disposed of their distributions.

The Settlement was a fundamental component of the 5th Amended Plan, as was the 363 Sale, insofar as at least approximately $1 billion of the assets that were distributed to the Debtors' stakeholders pursuant to the 5th Amended Plan were derived from the Settlement. Equally important, the 5th Amended Plan allocated among the Debtors' stakeholders the economic benefits and burdens of the Settlement and the 363 Sale. The Settlement cannot now be unwound without also unwinding the 363 Sale and the confirmed and substantially consummated 5th Amended Plan.

Moreover, rather than moving diligently to obtain a stay to preserve the *status quo*, the Creditors' Committee, a co-proponent with the Debtors of the 5th Amended Plan, worked tirelessly to confirm and consummate it. Huff, although not a co-proponent of the 5th Amended Plan, actively supported it as well. In fact, Petitioners actively opposed an attempt by a group of objecting creditors to

obtain a stay of the Bankruptcy Court's confirmation order pending appeal to the District Court (the "Confirmation Appeal"). Ironically, the Creditors' Committee, together with the Debtors, successfully obtained dismissal of the Confirmation Appeal by invoking and relying on the very Second Circuit equitable mootness jurisprudence that Petitioners now contend merits review by this Court.

Last, even if the Second Circuit had reached the merits of the Appeal, Petitioners would not have been entitled to the relief they seek. While Petitioners characterize the Government's intended administration of the Restitution Fund as a violation of the "absolute priority rule," the Bankruptcy Court properly recognized (and the District Court properly found it had not abused its discretion in doing so) that there was sufficient uncertainty surrounding that issue to make it reasonable for compromise as one aspect of a multifaceted settlement that conferred substantial benefits on the Debtors' estates. The Settlement avoided among other things, criminal forfeiture and restitution claims through which the Government contended it stood in the shoes of a senior secured creditor holding a tax lien—senior to general unsecured creditors like Huff and the Creditors' Committees's constituents. Once distributed to the Government, the Debtors' assets ceased to be property of their estates and are not subject to the absolute priority rule.

For all of the foregoing reasons, Respondents respectfully submit that that the Petition should be denied.

COUNTER STATEMENT OF THE CASE

The Petition arises out of the bankruptcy of Adelphia Communications Corporation, one of the largest, most complicated bankruptcies in United States' history. The

Petitioners[3] seek what amounts to their eighth attempt to review a May 26, 2005 order of the Bankruptcy Court (the "9019 Order") approving the Settlement. Petitioners never requested either a stay of the 9019 Order from any court or an expedited appeal and, as described below, the Settlement has long since been fully performed and effectuated.

The material terms of the Settlement are: (a) the Rigas Family consented to the voluntary forfeiture to the Government of certain cable properties owned by them but historically managed by the Debtors and over which the Debtors claimed a constructive trust (the "RMEs");[4] (b) following forfeiture, the Government agreed to transfer the RMEs to the Debtors; (c) the Government agreed not to indict the Debtors, seek forfeiture of their assets, seek restitution or to pursue other criminal remedies against them for the wrongdoing of the Rigas Family; (d) the SEC agreed to withdraw claims filed against the Debtors seeking approximately $5 billion (excluding penalties) as disgorgement of the ill gotten gains obtained from the wrongdoing of the Rigas Family; and (e) in consideration for the Government's agreement to forbear from indictment and a panoply of other remedial devices, the Debtors agreed to pay the Government $715 million in cash, stock and other consideration following the consummation of a sale of substantially all of their assets to the Buyers through the 363 Sale. (JA-25-31.)[5]

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[3] Petitioners here are the Official Committee of Unsecured Creditors (the "Creditors' Committee") and W.R. Huff Asset Management Co., LLC ("Huff").

[4] The RMEs were worth approximately $1 billion.

[5] References to the evidence submitted by the parties in a Joint Appendix to the Second Circuit shall be in the form of "JA-__." References to the affidavits, briefs and other documents attached to this Opposition Brief shall be in the form of "App. _ a." References to the decisions, orders and statutes that are appended to the Petition for a Writ of Certiorari shall be in the form "Pet. App. _a."

In late May 2006, the Debtors moved in the Bankruptcy Court for authority to consummate the 363 Sale and, on June 28, 2006, the Bankruptcy Court entered an order approving that sale (the "363 Sale Order").[6] On July 31, 2006, the Debtors closed the 363 Sale, selling their assets—including the RMEs obtained from the Rigases, via the Government, pursuant to the Settlement—to the Buyers for over $17 billion. (App. 5a (Abrams Aff. at ¶5).)

Neither of the Petitioners opposed the 363 Sale. In fact, counsel for the Creditors' Committee voiced enthusiastic support for it at the hearing.[7] Because neither the 9019 Order nor the 363 Sale Order was stayed (no appeal was even taken from the 363 Sale Order), the Second Circuit would have been unable to grant effective relief had it reached the merits of the Appeal.

The record before the Second Circuit reflected that the following, among many other, actions occurred in the absence of a stay of the 9019 Order or the 363 Sale Order: (a) the Debtors withdrew their action against the Rigas Family seeking to impose a constructive trust over the RMEs; (b) the SEC withdrew its proof of claim against the Debtors seeking estimated claims of $5 billion (exclusive of penalties); (c) the DoJ terminated its criminal investigation of the Debtors; (d) the Rigases, on June 7, 2005, forfeited the RMEs to the DoJ; (e) the DoJ, from June 7, 2005 to March 29, 2006, conducted forfeiture proceedings with respect to the RMEs; (f) the DoJ, upon the conclusion of the forfeiture proceedings, delivered the RMEs to the Debtors free and clear of the Rigas Family's interest in and

[6] (*See* App. 5a.). Affidavit of Marc R. Abrams, Esq., sworn to August 7, 2006 (the "Abrams Aff.") at ¶5. The Abrams Affidavit, which was submitted to the Second Circuit in support of Respondents' motion to dismiss the Appeal on equitable mootness grounds, is included in its entirety in Respondents' Appendix App. 1a-111a.

[7] (App. 6a (Abrams Aff. ¶8 n. 7).)

claims to them; (g) the Debtors, on May 26, 2006, moved before the Bankruptcy Court for authority to consummate the 363 Sale; (h) the Debtors proposed to obtain an additional nearly $1 billion from the Buyers by including the RMEs in the 363 Sale; (i) the Bankruptcy Court, on June 28, 2006, approved the 363 Sale; (j) the Bankruptcy Court, on June 28, 2006, confirmed plans of reorganization for certain Debtor entities (the "JV Plans"), premised on funding from the proceeds of the 363 Sale; (k) the Debtors, on July 31, 2006, consummated the 363 Sale, with the Buyers relying on the validity of the 9019 Order to satisfy certain closing conditions for such sale; (l) the JV Plans, on July 31, 2006, went effective; and (m) distribution of sale proceeds to creditors and to certain escrow agents funded by the JV Plans began on or about July 31, 2006 (over $1.6 billion as of August 7, 2006). (See App. 7a-10a (Abrams Aff. ¶¶ 12-29)).

Although the case for mootness was already overwhelming as of the Second Circuit's dismissal of the Appeal,[8] subsequent events have made the relief Petitioners seek all the more impractical and inequitable today. Following a confirmation hearing that lasted nine days between December 7 and 19, 2006, the Bankruptcy Court confirmed the 5th Amended Plan on January 3, 2007 (the "Confirmation Order"), over the objection of a group of creditors holding senior notes issued by ACC, the parent debtor (the "ACC Bondholder Group").[9] Thereafter, the ACC Bondholder Group initiated the Confirmation Appeal[10] and sought a stay pending appeal. The District Court ultimately denied the stay February 12, 2007, due to

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[8] *See In re Adelphia Commc'ns. Corp.*, 2006 WL 3826700 at *1 n. 3.

[9] *See In re Adelphia Comnc'ns. Corp.*, 361 B.R. 337, 345 (S.D.N.Y. 2007) (Scheindlin, D.J.)

[10] *Id.* at 341-42.

the ACC Bondholder Group's failure to post a reasonable bond.[11]

The following day, February 13, 2007 (the "Effective Date"), the 5th Amended Plan went effective. On that date, over $6.49 billion in cash was distributed to in excess of 8,000 holders of Allowed Claims. The identity of at least 3,000 of such holders is not known because their distributions were made indirectly through intermediary representatives, such as trustees under various bond indentures. *Id.* at *2. (*See also* App. 123a.) In addition, approximately 117,789,000 shares of freely tradeable TWC Class A Common Stock was distributed to approximately 13,500 holders of Allowed Claims. The identity of at least 8,000 of such holders is not known because their distributions were made indirectly through intermediary representatives, such as trustees under various bond indentures. Further, approximately 9.6 million shares of TWC Stock were distributed to the Government to compensate victims of the Rigas family's fraud via the victim restitution fund. Both the holders of Allowed Claims and the Government have been free since their receipt of the stock to sell, encumber or otherwise transfer ownership of any or all of the stock, as has any subsequent holder of the stock. *Id.* (*See also* App. 123a-124a.)

Clearly there is no way that the Second Circuit could, on remand, fashion any kind of effective or equitable relief without knocking the props out from under the thousands of transactions that underlie the 5th Amended Plan, which came to fruition only after the Settlement and the 363 Sale had occurred.

[11] *See In re Adelphia Comme'ns. Corp.*, No. 02-41729 (REG) and No. 07 Civ. 1172 (SAS), 2007 WL 1002127, *1 (S.D.N.Y. Apr. 2, 2007) (Scheindlin, D.J.)

ARGUMENTS IN SUPPORT OF DENIAL OF THE PETITION

I. THERE IS NO SPLIT OF AUTHORITY AMONG THE CIRCUITS WITH RESPECT TO THE DOCTRINE OF EQUITABLE MOOTNESS, AND THE SECOND CIRCUIT PROPERLY DISMISSED THE APPEAL AS EQUITABLY MOOT.

Petitioners contend that the Court should review the Second Circuit's dismissal of the Appeal because the standard that the Second Circuit employed in dismissing the Appeal as equitably moot purportedly conflicts with the standards employed by the First, Fourth, Fifth, Seventh, Ninth, Eleventh and D.C. Circuits. No such conflict exists among the Circuits, however. On the contrary, each of the Circuits analyzes the same overall factors to determine whether an appeal has been rendered equitably moot. Put differently, Petitioners' appeal would have been dismissed as equitably moot had the dismissal motion been considered by any of the Second Circuit's sister Circuits.

An Article III court must confine itself to adjudication of live controversies; it may not "give opinions upon moot questions or abstract propositions, or . . . declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green*, 159 U.S. 651, 653 (1895). The limitation imposed on the exercise of Article III jurisdiction may require the dismissal of an appeal as moot where no effective remedy can be provided or where the court has lost jurisdiction over the case or the parties. *See In re Pub. Serv. Co. of N.H.*, 963 F.2d 469, 471 n.4 and 5 (1st Cir. 1992); *Official Comm. of Unsecured Creditors of LTV Aerospace & Def. Co. v. Official Comm. of Unsecured Creditors of LTV Steel Co. (In re Chateaugay Corp.)*, 988 F.2d 322, 325 (2d Cir. 1993) ("*Chateaugay I*") (citing *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990)). Such circumstances present constitutional

mootness. *See Church of Scientology v. United States*, 506 U.S. 9, 12 (1992).[12]

In addition to constitutional mootness, where effective relief simply cannot be granted, courts recognize that an appeal that may not be moot in the constitutional sense may nevertheless be subject to dismissal on equitable grounds. Thus, "[a]n appeal should also be dismissed as [equitably] moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable." *Chateaugay I*, 988 F.2d at 325 (citing *In re AOV Indus., Inc.*, 792 F.2d 1140, 1147 (D.C. Cir. 1986); *In re Roberts Farms, Inc.*, 652 F.2d 793, 798 (9th Cir. 1981)). This "is a pragmatic principle, grounded in the notion that, with the passage of time, after a judgment in equity and implementation of that judgment, effective relief on appeal becomes impractical, imprudent, and therefore inequitable." *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 144 (2d Cir. 2005) ("*Metromedia*") (quoting *Mac Panel Co. v. Va. Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002)). "These principles are especially pertinent in bankruptcy proceedings, where the ability to achieve finality is essential to the fashioning of effective remedies." *Chateaugay I*, 988 F.2d at 325. *See also Allstate Ins. Co. v. Hughes*, 174 B.R. 884, 888 (S.D.N.Y. 1994).

Frequently, the equitable mootness doctrine arises in the context of an appeal from an order confirming a plan of

[12] Petitioners cite to *Colorado River Water Dist. v. United States*, 424 U.S. 800, 817 (1976), for the proposition that courts have an "unflagging obligation" to exercise jurisdiction where it exists. Petition at 15. *Colorado River* does not address the doctrine of equitable mootness, however. Instead, it addresses situations in which a federal court should decline jurisdiction because of a concurrent state court proceeding, which of course has no relevance here.

reorganization where, as a result of the appellant's failure to diligently procure a stay, the plan of reorganization has been substantially consummated. All the Circuit courts "recognize[ ] that a plan of reorganization, once implemented, should be disturbed only for compelling reasons." *In the Matter of: UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994). For that reason, there is a "strong presumption disfavoring an appellate remedy which would undermine the entire reorganization." *In re Pub. Serv. Co.*, 963 F.2d 469, 474 (1st Cir. 1992). Where a bankruptcy plan has been "substantially consummated," courts review the equities of the situation presented on a case-by-case basis to determine whether any relief can be granted and whether it would be equitable to do so given how far the plan has progressed. The case-by-case equitable mootness analysis employed by the Circuits is necessarily fact intensive and not easily cabined, but the analysis is based on the same operative legal standards.[13]

In the Second Circuit, substantial consummation will not render an appeal equitably moot if the appellant is able to satisfy each of the following objective factors:

> (a) the court can still order some effective relief; (b) such relief will not affect the re-emergence of the debtor as a revitalized corporate entity; (c) such relief will not unravel intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place and create an unman-

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[13] Equitable mootness is by no means limited to situations involving substantially consummated plans of reorganization. On the contrary, the doctrine is applicable anytime an "appellant has made no effort to obtain a stay and has permitted 'such a comprehensive change of circumstances to occur as to render it inequitable' for the appellate court to reach the merits of the appeal." *In re Crystal Oil Co.*, 854 F.2d 79, 82 (5th Cir. 1988) (quoting *Roberts Farms*, 652 F.2d at 798). *See also Chateaugay I*, 988 F.2d at 323 (dismissing appeal as moot in case that did not involve a substantially consummated plan).

> ageable, uncontrollable situation for the Bankruptcy Court; (d) the parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings; (e) the appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable order. . . if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.

In re Chateaugay Corp., 10 F.3d 944, 952-53 (2d Cir. 1993) (*Chateaugay II*) (internal quotations and citations omitted). *See also Metromedia*, 416 F.3d at 144; *Six West Retail Acquisition, Inc. v. Loews Cineplex Entm't. Corp.*, 286 B.R. 239, 245 (S.D.N.Y. 2002); *Kassover v. Gibson*, No. 02 Civ. 7978 (WHP), 2003 WL 21222341, *2-3 (S.D.N.Y. May 27, 2003); *Allstate Ins. Co.*, 174 B.R. at 889. Contrary to Petitioners' suggestion, these factors do not differ in substance from those used in the other Circuits to determine whether an appeal has become equitably moot.

In attempting to manufacture a Circuit split, Petitioners present three arguments: (a) that the Second Circuit's test for determining whether to dismiss an appeal as equitably moot is "subjective" whereas the test used in the First, Fourth, Fifth, Seventh and Ninth Circuits is "objective;" (b) that the Second Circuit test precludes consideration of the merits of an appellant's arguments, in contrast to the test supposedly used in the Eleventh and D.C. Circuits; and (c) that the Second Circuit's test places undue emphasis on the absence of a stay, in supposed contrast with the approach utilized in other Circuits. None of these arguments, each of which is considered in turn, has merit.

A. The Second Circuit's Equitable Mootness Analysis Is No More "Subjective" Than, Nor Inconsistent With, The Analyses Applied In Other Circuits.

Contrary to Petitioners' conclusory assertion, the Second Circuit does not, in fact, utilize a more "subjective" test in evaluating claims of equitable mootness than other Circuits. The Second Circuit looks to the five objective and well articulated *Chateaugay II* factors (each of which is detailed above) in order to evaluate whether, in the Court's discretion, an appeal should be dismissed as equitably moot. Those factors are nearly identical—in substance if not in nomenclature—to the "objective" factors to which Petitioners contend the First, Fourth, Fifth, Seventh and Ninth Circuits look. This is readily apparent from the very cases on which Petitioners rely.

In *In re Public Service Company,* 963 F.2d 469 (1st Cir. 1992) ("PSC"), the First Circuit dismissed an appeal as equitably moot because "unraveling the substantially consummated . . . reorganization plan would work incalculable inequity to many thousands of innocent third parties who have extended credit, settled claims, relinquished collateral and transferred or acquired property in legitimate reliance on the unstayed order of confirmation." 963 F.2d at 475. These considerations are substantively indistinguishable from the analysis called for by the second, third and fourth *Chateaugay II* factors. The *PSC* Court also found appellant's failure to procure a stay highly relevant because "[t]he absence of a stay allowed performance under the . . . reorganization plan to proceed to a point well beyond any practicable appellate annulment." *Id.* at 473. This analysis mirrors the fifth (failure to seek a stay) and first (inability to grant effective relief) *Chateaugay II* factors. There is simply no conflict between the First and the Second Circuits.

In *In re Continental Airlines*, 91 F.3d 553 (3d Cir. 1996), the Third Circuit affirmed a dismissal based on equitable mootness, and noted that the factors courts employ in evaluating "whether it would be equitable or prudential to reach the merits of a bankruptcy appeal include (1) whether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments." *Id.* at 560. There is no conflict between the Third and the Second Circuits.

In *Central States, S.E. and S.W. Areas Pension Fund v. Central Transport, Inc.*, 841 F.2d 92 (4th Cir. 1988), the court's justification for dismissal of an appeal from a confirmation order as equitably moot echoed the first, 841 F.2d at 95-96, second, third, *id.* at 96, fourth, *id.*, and fifth, *id.* at 93, *Chateaugay II* factors. Petitioners' suggestion that the Second and Fourth Circuits' equitable mootness jurisprudence are in conflict is, in a word, wrong.

In *In re GWI*, 230 F.3d 788 (5th Cir. 2000), the Fifth Circuit articulated a three-pronged test requiring an appellate court evaluating whether a claim is equitably moot to consider "whether (1) a stay has been obtained, (2) the plan has been substantially consummated, and (3) the relief requested would affect either the rights of parties not before the court or the success of the plan." 230 F.3d at 800. This test is substantively indistinguishable from *Chateaugay II*. The first *GWI* factor is identical to the fifth *Chateaugay II* factor and the second and third *GWI* factors capture the essence of the second, third and fourth *Chateaugay II* factors. Here again, no conflict exists.

In *In the Matter of: UNR Industries, Inc.*, 20 F.3d 766 (7th Cir. 1994), it is true that the Seventh Circuit expressed

disdain for the term "equitable mootness." 20 F.3d at 769. But it did not reject the concept underlying that doctrine. Indeed, the Court went on to dismiss the appeal from the confirmation order because it was not "prudent to upset the plan of reorganization at this late date." *Id.* While careful not to use the nomenclature "equitable mootness" as the basis for its ruling, the Court's analysis nevertheless tracked the *Chateaugay II* factors. By way of example, echoing the fifth *Chateaugay II* factor, the Court found that that the appellant's "failure to [obtain] a stay pending appeal counsels against upsetting a plan of reorganization." *Id.* And echoing the second, third and fourth *Chateaugay II* factors, the Court further found that "the reliance interests engendered by the plan, coupled with the difficulty of reversing the critical transactions, . . . counsels against attempts to unwind things on appeal. Every incremental risk of revision on appeal puts a cloud over the plan of reorganization and derivatively over the assets of the reorganized firm." *Id.* at 770. No conflict exists between the Seventh and the Second Circuit.

Finally, in *In re Roberts Farms*, 652 F.2d 793 (9th Cir. 1981), the Ninth Circuit dismissed an appeal from a confirmation order as equitably moot, utilizing an analysis that mirrors the first, 652 F.2d at 797, second, *id.*, third, *id.* and fifth, *id.* at 798, *Chateaugay II* factors. There is absolutely no inconsistency between the Ninth Circuit and the Second Circuit on this subject.

It also merits noting that neither the Eleventh nor the D.C. Circuit conflict with the Second Circuit either. In *In re Club Associates*, 956 F.2d 1065 (11th Cir. 1992), the Eleventh Circuit explained that an appellate court evaluating equitable mootness should consider "whether a confirmation plan has progressed to the point where effective judicial relief is no longer a viable option" (invoking the first *Chateaugay II* factor). 956 F.2d at 1069. The Eleventh

Circuit also considers the following subsidiary questions (which invoke the fifth, third, fourth and second *Chateaugay II* factors, respectively): "Has a stay pending appeal been obtained? If not, then why not? Has the plan been substantially consummated? If so, what kind of transactions have been consummated? What type of relief does the appellant seek on appeal? What effect would granting relief have on the interests of third parties not before the court? And, would relief affect the re-emergence of the debtor as a revitalized entity?" *Id.* The absence of any conflict between this analysis and that utilized in the Second Circuit is self evident.

And in *In re AOV*, 792 F.2d 1140 (D.C. Cir. 1986), the D.C. Circuit's analysis of the equitable mootness captured each of the five *Chateaugay II* factors. Thus, the Court considered whether: (a) events had occurred during the pendency of the appeal that "render[ed] it impossible for this court . . . to grant [appellant] any effectual relief whatever," *In re AOV*, 792 F.2d at 1147; (b) granting the relief appellant sought would "affect the re-emergence of the debtor as a revitalized corporate entity," *id.* at 1149; (c) "reversal could knock the props out from under the authorization for every transaction that has taken place [and] would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court," *id.* at 1148; (d) affording relief to appellant would "have an adverse effect on the interests of other, non-party creditors," *Id.* at 1149; and (e) the extent to which appellants' unsuccessful effort to obtain a stay was fatal, *id.* at 1147.

In short, the Circuits are entirely consistent in their analysis of equitable mootness. Each performs what is in essence a discretionary, cost-benefit review of all the facts and circumstances in an effort to assess the practicality and equity of affording relief to an appellant. Although the Circuits may employ somewhat different terminology at times, they all consider substantially the same factors in

analyzing the equities. To characterize the Second Circuit as employing a "subjective" analysis and other Circuits an "objective" analysis is creative but erroneous. No conflict exists among the Circuits.[14]

B. None Of The Circuits Considers The Substantive Merits Of An Appeal In Determining Whether To Dismiss For Equitable Mootness.

Petitioners argue that Supreme Court review is warranted because the Second Circuit failed to consider the merits of the Appeal in deciding whether it would be equitable to grant Petitioners relief. This contention is premised on the fiction that courts in the Eleventh and D.C. Circuits consider the substantive merits of an appellant's arguments in exercising their discretion to dismiss an appeal as equitably moot. They do nothing of the sort.

An examination of *In re Club Associates*, 956 F.2d 1065 (11th Cir. 1992), and *In re AOV Industries*, 792 F.2d 1140 (D.C. Cir. 1986), the two cases relied on by Petitioners,

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[14] Petitioners also fault the Second Circuit for "shifting the burden" onto the appellant to rebut the equitable mootness factors in order to avoid dismissal by demonstrating that the relief it seeks will not be inequitable. Petition at 17. All the Circuits place the burden on the appellant, where substantial consummation of a plan has occurred, to demonstrate that the appeal is not moot under the *Chateaugay II* factors. It is the appellant (not the appellee) that seeks relief from the appellate court, having failed to prevail in the court below. It is incumbent on the appellant to take asteps to ensure that the relief it seeks is capable of being granted in a practical and equitable way by (among other things) diligently seeking a stay. *See, e.g.*, *Roberts Farms*, 652 F.2d at 798 (holding that "it is obligatory upon appellant in a situation like the one with which we are faced to pursue with diligence all available remedies to obtain a stay of execution of the objectionable order" and further holding that it is "justified" to place this "heavy burden" on the appellant because "[i]f an appellant fails to obtain a stay after exhausting all appropriate remedies, that well may be the end of his appeal.").

reveals that neither court considered the substantive merits of the appellant's arguments in determining whether to dismiss the appeal as equitably moot. On the contrary, in each case, the court evaluated—on a claim-by-claim basis—the remedy sought by the appellant (not the substantive merits of the claim) and made an independent determination as to whether each claim should be dismissed as equitably moot. Thus, the *AOV* Court noted that:

> In exercising its discretionary power to dismiss an appeal on mootness grounds, a court cannot avoid its obligation to scrutinize each individual claim, testing the feasibility of granting the relief against its potential impact on the reorganization scheme as a whole. 'Substantial Consummation' is not a blanket discharge of [the] judicial duty to examine carefully each request for relief." 792 F.2d at 1148 (emphasis added).

In *AOV*, the D.C. Circuit considered the actual substantive merits of only one of the claims asserted by the appellants, and it did so only after determining that "the judgment [for that claim] will not implicate or have an adverse effect on the interests of other non-party creditors and . . . will not affect the re-emergence of the debtor as a revitalized corporate entity." *In re AOV*, 792 F.2d at 1149. In other words, the *AOV* court turned to the substantive merits of that one claim only after concluding that the appellate issue raised by that claim was not equitably moot. *In re AOV*, 792 F.2d at 1149.[15]

[15] Similarly, in *Club Associates*, the Court declined to consider the substantive merits of any of the appellate claims because "[i]t [was] clear from the record that the relief requested by [appellant] in its first three issues on appeal would have jeopardized the Plan as a whole, which in turn would have put at risk the limited partners' newly invested funds." 956 F.2d at 1071 (emphasis added).

The Second Circuit does exactly the same thing. In *In re Chataeugay II*, the Second Circuit found that an appeal by creditor Frito-Lay was not moot because the court was able to fashion effective relief to address the claims presented by Frito-Lay's appeal. *See In re Chateaugay II*, 10 F.3d at 953. As is the case with other Circuits, only upon making the threshold determination about whether the appeal was equitably moot, did the Second Circuit proceed to review the merits of Frito-Lay's appeal. *Id.* at 954-961.

Here, the Second Circuit properly concluded that it would have been inequitable to grant Petitioners relief. It therefore did not reach the merits of the Appeal.

C. The Second Circuit Does Not Treat The Absence Of A Stay As Dispositive, Though (Like In Every Other Circuit) That Factor Is Highly Relevant.

Finally, there is no validity to Petitioners' third argument that the Second Circuit places greater emphasis than its sister Circuits on the absence of a stay. As previously noted, all of the Circuits include the absence of a stay as one of the factors to be weighed and considered in evaluating a claim of equitable mootness. Although none of the Circuits (including the Second Circuit) views it as singularly dispositive, all of the Circuits view it as relevant.

For example, in *Club Associates*, the Eleventh Circuit held that while "failure to obtain a stay does not necessarily preclude review of [an] appeal . . . the absence of a stay [is] relevant to [a court's] equities determination which underlay the mootness inquiry." *In re Club Assoc.*, 956 F.2d at 1070. Similarly, in *AOV*, the D.C. Circuit observed that the while the "[f]ailure to secure a stay is not per se dispositive of all the issues before" a reviewing court, it could nevertheless be "fatal" where "reversal of [an unstayed] confirmation order would require the inval-

idation of good faith transfers." *In re AOV*, 792 F.2d at 1147. In *Roberts Farms*, the Ninth Circuit held that "If an appellant fails to obtain a stay after exhausting all appropriate remedies, that well may be the end of his appeal." *Roberts Farms*, 652 F.2d at 798.

The First Circuit, in *PSC*, noted that the failure to seek such a stay "may moot the matter in dispute." *In re Pub. Serv. Co. of N.H. v. N.E Utilities Serv. Group.*, 963 F.2d 469, 473 (1st Cir. 1992). The Fourth Circuit expressed similar sentiments, noting that the failure to seek a stay or expedited appeal "weighs strongly in favor of a finding of equitable mootness." *In re U.S. Airways Group, Inc.*, 369 F.3d 806, 810 (4th Cir. 2004). Finally, the Seventh Circuit, in *UNR*, observed that "failure to seek a stay counsels against upsetting a plan of reorganization" because a stay "holds things in stasis [and] prevent[s] reliance on the plan of reorganization while the appeal proceeds." *In the Matter of UNR Indus., Inc.*, 20 F.3d 766, 769-70 (7th Cir. 1994). These Courts are consistent with the Second Circuit's approach. *See, e.g., Chateaugay I*, 988 F.2d at 326 ("The party who appeals without seeking to avail himself of [the] protection [of a stay] does so at his own risk.")

Here, Petitioners never sought a stay of the 9019 Order, nor did they seek to expedite their appeal in either the District Court or the Second Circuit. Instead, they consciously elected to remain idle while the Debtors, the Government and the Rigases performed their obligations under the Settlement. They then supported the 363 Sale and readily accepted the benefits of the inclusion of the RMEs in that sale. Thereafter, they actively sought confirmation of the 5th Amended Plan (with the Creditors' Committee being a co-proponent of that Plan) and opposed the ACC Bondholder Group's attempts to stay the Confirmation Order, resulting in confirmation and substantial consummation of the 5th Amended Plan, including distribution of the pro-

ceeds of the 363 Sale attributable to the RMEs recovered by the Debtors as part of the Settlement. These facts compel the dismissal of the Appeal as equitably moot, inasmuch as there is no way for any court to fashion effective or equitable relief now even if Petitioners' substantive argument had merit, which it does not.

II. The Court Should Decline To Issue a Writ of Certiorari Because Petitioners Are Judicially Estopped From Challenging The Validity Of The Second Circuit's Equitable Mootness Jurisprudence.

As noted in the Statement of the Case, above, no more than a few months ago in the context of this very same bankruptcy case, the Creditors' Committee[16] argued to District Court Judge Shira Scheindlin that, pursuant to the Second Circuit's equitable mootness jurisprudence, the Confirmation Appeal should be dismissed due to the ACC Bondholder Group's failure to obtain a stay of the Confirmation Order during the pendency of the Confirmation Appeal and the ensuing substantial consummation of the 5th Amended Plan. (*See generally* App. 111a-147a.)

The Creditors' Committee vociferously opposed the arguments made by the ACC Bondholder Group (ironically repeated now by Petitioners) that dismissal of the Confirmation Appeal on equitable mootness grounds was improper because it deprived the ACC Bondholders Group of the opportunity to have their appellate arguments heard on their merits. The Creditors' Committee also admonished the District Court that it could not avoid dismissing the Confirmation Appeal on equitable mootness grounds by simply fashioning some kind of "rough justice" in the form of an order that left the 5th Amended Plan largely

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16 Huff is the Chair of the Creditors' Committee.

intact but excised certain provisions that the ACC Bondholder Group found offensive.

Yet now Petitioners have turned 180 degrees. Where a few months ago the Second Circuit's equitable mootness jurisprudence was perfectly acceptable to Petitioners when its application served their purposes, now it is so offensive that it requires the important attention of this country's highest Court. It is precisely this kind of conduct that the doctrine of judicial estoppel is designed to address.

The equitable doctrine of judicial estoppel provides that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 742-743 (2001) (*quoting Davis v. Wakelee*, 156 U.S. 680, 689 (1895).[17]

That is exactly what Petitioners seek to do here in challenging the Second Circuit's "equitable mootness"

[17] To prove a claim for judicial estoppel, a party must establish that "(1) the party against whom judicial estoppel is being asserted advanced an inconsistent factual position in a prior proceeding, and (2) the prior inconsistent position was adopted by the first court in some manner." *United States v. Hussein*, 178 F.3d 125, 130 (2d Cir. 1999) (*quoting AXA Marine & Aviation Ins. (U.K.) Ltd. v. Seajet Indus. Inc.*, 84 F.3d 622, 628 (2d Cir. 1996). The doctrine of judicial estoppel also applies to preclude inconsistent legal assertions. *See e.g. Cont'l Ill. Corp v. Comm'r*, 998 F.2d 513, 518 (7th Cir. 1993) (doctrine forbids litigant from repudiating legal position on which it has prevailed); *see also Yniguez v. Arizona*, 939 F.2d 727, 738 (9th Cir. 1991) (doctrine also applies to inconsistent legal assertions.) "Judicial Estoppel is a doctrine intended to prevent the perversion of the judicial process. . . . [i]t is to be applied where intentional self-contradiction is being used as a means of obtaining unfair advantage. . .and to prevent litigants from 'playing fast and loose with the courts.' " *Matter of Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990) (internal citations omitted.)

jurisprudence after having just successfully invoked and relied on that very same jurisprudence in dismissing the ACC Bondholder Group's Confirmation Appeal. Petitioners should not be permitted in the same bankruptcy proceeding to assert the applicability of the Second Circuit's equitable mootness jurisprudence when it benefits them, and then turn around and challenge it when its application is less advantageous to their parochial interests.

III. EVEN IF THE SECOND CIRCUIT HAD REACHED THE MERITS OF PETITIONERS' APPEAL, THE SECOND CIRCUIT COULD NOT HAVE GRANTED THE RELIEF REQUESTED.

A. The Second Circuit Could Not Rewrite The Settlement, And This Court Should Not Remand With Instructions To Do So.

Cognizant of the inequity in attempting to unwind the Settlement and the 363 Sale, Petitioners urged the Second Circuit to simply excise the provision of the Settlement that affords the Government discretion in the administration of the Restitution Fund and substitute a directive that the Government distribute the Restitution Fund in accordance with the absolute priority rule. Petitioners repeat that call for "rough justice" in the Petition here. *See e.g.*, Petition at 24-25. Neither the Bankruptcy Court (in its original evaluation of the fairness of the Settlement), nor the District Court, nor the Second Circuit (in their consideration of the Appeal) possessed the authority to modify a settlement reached at arms' length, after vigorous and protracted negotiation, by independent parties. *See, e.g.*, *In re Cont'l Airlines Corp.*, 907 F.2d 1500, 1520 (5th Cir. 1990) ("neither the bankruptcy court nor the district court had any authority to change the terms of the settlement"); *In re Neshaminy Office Bldg. Assocs.*, 62 B.R. 798, 803 (E.D. Pa 1986) (bankruptcy court not permitted to sub-

stitute its judgment for that of the parties); *In re Ashford Hotels, Ltd.*, 226 BR 797, 802 (S.D.N.Y. 1998) (court constrained to approve or disapprove settlements proffered even if court would have selected a different settlement).[18] The reason is simple: it cannot be assumed that the parties would have been willing to settle on terms other than those upon which they agreed. There is absolutely no basis to believe that the Government would have entered into the Settlement if it did not retain sole discretion to determine who should receive the benefit of the Restitution Fund. In fact as the DoJ argued before the Second Circuit, "the Government made clear [in the Settlement negotiations] that its complete discretion to distribute the [R]estitution [F]und to victims in the manner it sees fit was critical to any non-prosecution agreement." (App. 183) (emphasis added.)[19] Because the Second Circuit did not have the freedom to fashion "rough justice," the Debtors believed (and still believe) that it is in their interests to oppose the Appeal rather than risk the inequity and chaos that could ensue from a ruling in Petitioners' favor.

In fact, the Creditors' Committee made precisely the same point to the District Court in the Mootness Brief in seeking to dismiss the Confirmation Appeal as equitably

[18] *See, also, Becker v. Warner Commc'ns Inc. (In re Warner Commc'ns Secs. Litig.*, 798 F.2d 35, 37 (2d Cir. 1986) ("[I]t is not a district judge's job to dictate the terms of a class settlement; he should approve or disapprove a proposed agreement as it is placed before him and should not take it upon himself to modify its terms."); *Patterson v. Newspaper & Mail Deliverers' Union*, 514 F.2d 767, 772 (2d Cir. 1975) ("[The Circuit Court is] powerless to rewrite the provisions" of settlement agreements); *Brooks v. Georgia State Bd. of Elections*, 59 F.3d 1114, 1119-20 (11th Cir. 1995); *Jeff D. v. Andrus*, 899 F.2d 753, 758 (9th Cir. 1989); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 630 (9th Cir. 1982); *Cotton v. Hinton*, 559 F.2d 1326, 1331-32 (5th Cir. 1977).

[19] (App. 148a-205a).

moot. There, the ACC Bondholders Group argued that it was possible to fashion some kind of rough equitable relief by simply tweaking certain provisions in the 5th Amended Plan to which it objected. In response, the Creditors' Committee argued that:

> To do so would impermissibly rewrite the bargain struck by the settling parties, which bargain was accepted by all classes of creditors voting on the [5th Amended] Plan. The Second Circuit made this clear in this very case when it dismissed as moot an appeal from a District Court order approving the settlement between the Government and the Rigases, finding that modification of the settlement agreements would deprive the Government of the benefits of their bargains in the four interrelated settlements approved by the 9019 order at issue." *Ad Hoc Adelphia Trade Claims Comm. v. Adelphia Commc'ns. Corp.*, 2006 U.S. App. LEXIS 32020 at *4-5 (2d Cir. Dec. 26, 2006) ("Adelphia Decision")[20] *See Metromedia*, 416 F.3d at 145 (dismissed appeal of release provisions in consummated plan as equitably moot because, even if Court vacated and remanded on the merits, the transactions completed pursuant to the Plan could not "be undone without violence to the overall arrangements."). *See also Becker v. Warner Commc'ns, Inc. (In re Warner Commc'ns. Sec. Litig.)*, 798 F.2d 35, 37 (2d Cir. 1986) ("[I]t is not a district Judge's job to dictate the terms of a class settlement; he should approve or disapprove a proposed agreement as it is placed before him and should not take it upon himself

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[20] It is particularly ironic that the Creditors' Committee cited to and relied on the very decision that it now seeks to have this court grant certiorari to review and overturn as erroneous. *See In re Adelphia Comnc'ns. Corp.*, No. 02-41729 (REG) and No. 07 Civ. 1172 (SAS), 2007 WL. 1002127 (S.D.N.Y. Apr. 2, 2007).

to modify its terms."); *Jeff D. v. Andrus*, 899 F.2d 753, 758 (9th Cir. 1989) ("[C]ourts are not permitted to modify settlement terms or in any manner to rewrite agreements reached by parties."); *Cotton v. Hinton*, 559 F.2d 1326, 1331-32 (5th Cir. 1977) ("We are not free to delete, modify or substitute certain provisions of the settlement. The settlement must stand or fall as a whole.")[21]

In short, as Petitioners themselves know, the Second Circuit could not have granted the relief they seek even if it had reached the merits.

B. The Appeal Lacks Merit In Any Event.

1. The Absolute Priority Rule Applies To Plans Of Reorganization, Not Rule 9019 Settlements.

The absolute priority rule is found in section 1129(b)(1) of the Bankruptcy Code. Under the plain language of that section, the absolute priority rule applies only to distributions made under a plan of reorganization. The payment to the Government pursuant to the Settlement is not a distribution under a plan of reorganization. *See In re World Health Alternatives, Inc.*, 344 B.R. 291, 297-98 (Bankr. D. Del. 2006) (holding that "[s]ection 1129(b)(2)(B) and the absolute priority rule . . . [are] not implicated [in this case] because the settlement [did] not arise in the context of a plan of reorganization" even where a settlement resulted in junior creditors receiving distributions without structurally senior creditors being paid in full.)[22]

[21] (App. 134a-135a.)

[22] Petitioners' reliance on *In re Iridium Operating LLC*, 478 F.3d 452 (2d Cir. 2007), and *In re AWECO, Inc.*, F.2d 293 (5th Cir. 1984), is misplaced. In *In re Iridium Operating LLC*, the court held that a court could endorse a settlement that does not satisfy the absolute priority

2. Even If The Absolute Priority Rule Were Applicable, The Settlement Would Not Violate It.

In order to characterize the payment to the Government pursuant to the Settlement as a distribution to a "junior" creditor that violates the absolute priority rule, Petitioners rely on 11 U.S.C. § 510(b). Even under the broadest conceivable construction, section 510(b) is applicable on its face only to claims brought by investors where the claim arises from the claimant's purchase or a sale of a security of the debtor. Here, but for the Settlement the SEC would have contended that its claim was not premised on its purchase or sale of Adelphia securities. Rather, it would have contended that its claim was premised on its regulatory power to enforce the securities laws and to seek disgorgement from those who violate those laws. Such a claim is arguably not subject to section 510(b).

Furthermore, Petitioners fail to acknoledge that the Settlement does more than merely resolve the SEC's disgorgement claim. In fact, it resolves a bundle of competing and potentially overlapping claims and remedial objectives of two governmental bodies. The Settlement resolved the

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rule so long as "the parties to the settlement justify, and the reviewing court clearly articulates the reasons for approving, a settlement that deviates from the priority rule." *In re Iridium*, 478 F.3d at 465. The Debtors articulated such a justification to Judge Gerber below (elimination of the risk of indictment and prosecution, together with a concomitant risk of losing over $1 billion in assets). Moreover both the *In re Iriduim* court and *In re AWECO* court vacated and remanded the approval of the Rule 9019 order because of the bankruptcy court's failure to justify the settlement with adequate factual findings and review. Here, the Bankruptcy Court provided extensive and justified grounds for approving the Settlement. Finally, the settlement at issue in both *In re Iridium* and *In re AWECO* involved payments directly from the debtor to a junior creditor. In contrast, the Settlement here involves a payment to the Government (as an asserted senior creditor) for use as a Restitution Fund to be distributed as the Government sought fit.

SEC's potential claims for disgorgement and/or penalties for violation of the federal securities laws. And it also resolves the DoJ's indictment and forfeiture remedies and claims under 18 U.S.C. § 3663 for restitution. It cannot be said that this entire bundle of claims and remedies is definitively subject to section 510(b)'s subordination provisions.[23]

Additionally, 18 U.S.C. § 3613 provides that: "[n]otwithstanding any other Federal law, a judgment imposing a fine may be enforced against all property or rights to property of the person fined" and "an order of restitution made pursuant to section[ ] . . . 3663 . . . of this title, is a lien in favor of the United States on all property and rights to property of the person fined as if the liability of the person fined were a liability for a tax assessed under the Internal Revenue Code of 1986." 18 U.S.C. § 3613(a), (c) (emphasis added). Were the Government to have obtained a judgment, it would have contended that its claim was senior to those of general unsecured creditors like Huff and the Creditors' Committee's constituents and that, in enforcing that claim it would not have been restricted or impaired by "any other federal law" (*i.e.*, including the Bankruptcy Code and its absolute priority provisions).[24]

[23] (*See* JA-1033.); *See also* 18 U.S.C. § 3613(c), (e) and (f); 11 U.S.C. § 523(a)(13).

[24] Petitioners reliance on 11 U.S.C. § 726(a)(4) is also misplaced. (*See* Petition at 29 n. 15.) In the event the Debtors were to propose a plan of reorganization that provided for distributions to the Government before other creditors received what they would get in a chapter 7 liquidation, section 726(a)(4) would not require that the Government's claim be subordinated. Rather that section would, absent acceptance of the plan by creditors, possibly render the plan subject to challenge at confirmation. The Bankruptcy Court recognized this distinction (notwithstanding Petitioners' attempt to blur it), concluding that section 726(a)(4) would in no circumstances result in subordination or disallowance of a claim.

In sum, the lower courts neither manifestly erred nor abused their discretion in holding that the law was sufficiently unsettled as to the applicability and effect of the absolute priority rule that the compromises in the Settlement were reasonable.

Last, Petitioners resort to a "form over substance" argument, contending that even if the absolute priority rule does not "technically" apply, the Second Circuit should nevertheless have reached the merits and applied its substance here. (Petition at 29.) But, as the District Court noted, it is not the role of the courts to disapprove otherwise reasonable settlements (arguably abusing their discretion in the process) so as to amend the Bankruptcy Code in a manner that Congress has not seen fit to do. (*See* Pet. App. 13a.) If Petitioners believe that the law should be that the absolute priority rule must always be observed, the proper forum for seeking that relief is in the United States Congress, not the courts.

CONCLUSION

For all of the reasons set forth herein, the Debtors respectfully request that the Court decline to grant a writ of certiorari in this matter, inasmuch as no genuine conflict exists among the Circuits and the complete performance of the Settlement, the effectuation of the 363 Sale, and the substantial consummation of the 5th Amended Plan (not to mention countless other actions taken and completed since the Appeal was taken) have rendered moot all matters presented by Petitioners.

Dated: New York, New York
July 2, 2007

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06-1417-bk(L)

06-1738-bk(XAP)

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE: ADELPHIA COMMUNICATIONS CORPORATION,

Debtor.

AD HOC ADELPHIA TRADE CLAIMS COMMITTEE, OFFICIAL COMMITTEE OF UNSECURED CREDITORS, W.R. HUFF ASSET MANAGEMENT CO., LLC, U.S. BANK NATIONAL ASSOCIATION AS INDENTURE TRUSTEE,

Appellants-Cross-Appellees,

—against—

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF MARC R. ABRAMS, ESQ.
IN SUPPORT OF APPELLEES' MOTION TO DISMISS APPEAL

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STATE OF NEW YORK)
) : ss.:
COUNTY OF NEW YORK)

Marc R. Abrams, Esq., being duly sworn, deposes and says:

1. I am a member of the bar of this Court and of the law firm of Willkie Farr & Gallagher LLP, counsel to Adelphia Communications Corporation, *et al.* ("*Debtors*"), appellees in the above-captioned appeal (the "*Appeal*"). I submit this Affidavit in support of Debtors' motion to dismiss the Appeal (the "*Motion*").

2. Through the Appeal, the Official Committee of Unsecured Creditors of Adelphia (the "*Creditors' Committee*"), the Ad Hoc Adelphia Trade Claims Committee, W.R. Huff Asset Management Co., LLC ("*Huff*"), and U.S. Bank National Association, as Indenture Trustee (collectively, "Appellants") seek review of an order of the United States Bankruptcy Court for the Southern District of New York (the "*Bankruptcy Court*"), entered on May 26, 2005 (the "*9019 Order*"), approving a complex and interlocking four-way settlement (the "*Settlement*") among the Debtors, the Department of Justice (the "*DOJ*"), the Securities and Exchange Commission (the "*SEC*" and, together with the DOJ, the "*Government*") and members of the Rigas family (the "*Rigas Family*").[1]

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[1] A copy of the 9019 Order is reproduced at pages SPA-63 – SPA-75 in the Special Appendix (the "*SA*") submitted by the parties in connection with the Appeal. A copy of the Bankruptcy Court's Bench Decision in connection with the 9019 Order is reproduced at pages SPA-1 – SPA-62.

3. The material terms of the Settlement are: (a) the Rigas Family consented to the voluntary forfeiture of certain cable properties (in connection with the sale of substantially all of the Debtors' assets, the Debtors would have been penalized approximately $1 billion if they had not been able to convey the RMEs) owned by them but historically managed by the Debtors and over which the Debtors claimed a constructive trust (the "*RMEs*[2]"); (b) the Government agreed to turn such properties over to the Debtors in exchange for the Debtors' agreement to pay the Government $715 million (consisting primarily of cash and stock, and including a $115 million interest in a litigation trust vehicle) following the consummation of a sale of substantially all of their assets to Time Warner NY Cable LLC and Comcast Corporation (collectively, the "*Buyers*"); (c) the Government agreed not to indict the Debtors, or seek forfeiture of their assets, for the wrongdoing of the Rigas Family; and (d) the SEC agreed to withdraw claims filed against the Debtors, seeking estimated claims of $5 billion (excluding penalties) as disgorgement of the ill gotten gains from the wrongdoing of the Rigas Family. Under the 9019 Order, the Rigas Family agreed to forfeit certain assets, including the RMEs, certain securities of the Debtors and other assets, to the DOJ and the DOJ, in turn, agreed to convey them to the Debtors.[3]

[2] The term "RMEs" is an abbreviation for "Rigas Managed Entities."

[3] The Settlement is comprised of four separate, but interlocking agreements: (a) an agreement between Adelphia and the DOJ (the "*DOJ/Adelphia Agreement*"); (b) an agreement between Adelphia and the Rigas Family (the "*Rigas/Adelphia Agreement*"); (c) a consent decree between Adelphia and the SEC (the "*SEC/Adelphia Agreement*"), approved by Judges Castel and Gerber; and (d) an agreement between the Rigas Family and the Government (the

4. Appellants did not seek a stay of the 9019 Order in either the District Court or in this Court during the pendency of the Appeal, nor did they seek to expedite the appeal in either Court.

5. In late May 2006, the Debtors moved before the Bankruptcy Court for authority to conduct a sale (the "*363 Sale*") of substantially all of their assets to Time Warner NY Cable LLC and Comcast Corporation (collectively, the "*Buyers*") pursuant to section 363 of title 11 of the United States Code. Following an evidentiary hearing (at which none of the Appellants objected), the Bankruptcy Court authorized the 363 Sale in an order dated June 28, 2006 (the "*363 Sale Order*").[4] On July 31, 2006, the Debtors closed the 363 Sale, selling their assets to the Buyers for in excess of $17 billion.[5]

6. Simultaneous with the 363 Sale process, the Debtors also promulgated and, later confirmed, plans of reorganization for certain Debtor entities (the "*JV Plans*"). The Bankruptcy Court conducted a confirmation hearing on the JV Plans on June 28, 2006 and confirmed those plans on June 29, 2006. The JV Plans went effective on July 31, 2006 in conjunction with the closing of the 363 Sale. Distributions to creditors under the JV Plans (in excess of $1.6 billion to date) were funded

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"*Rigas/DOJ Agreement*"). The Rigas/DOJ Agreement was not before the Bankruptcy Court; it was approved by District Court Judge Sand (who presided over the criminal prosecution of certain members of the Rigas Family). Copies of the DOJ/Adelphia Agreement, the Rigas/Adelphia Agreement and the SEC/Adelphia Agreement are reproduced at pages A-57 – A-162 of the Joint Appendix (the "*JA*") submitted by the parties in connection with the Appeal.

[4] A copy of the 363 Sale Order is annexed hereto as *Exhibit 1*.

[5] Annexed hereto as *Exhibit 2* is a copy of an Adelphia Press Release, dated July 31, 2006, announcing the closing of the 363 Sale.

entirely from the 363 Sale. The JV Plans will have been substantially consummated by the time this Court hears argument on the Appeal.

7. The consummation of the 363 Sale proved to be a significant milestone for the Debtors. In the weeks prior to consummation of the 363 Sale, substantial progress toward a consensual plan of reorganization for the remainder of the non-JV Debtors (a "*Global Plan*") was made. On July 21, 2006, the Debtors and certain of the Appellants entered into an agreement (the "*Term Sheet*") setting forth the terms on which certain major unsecured creditors were prepared to support a Global Plan, paving the way for confirmation of such plan.[6] Like the JV Plans, the Global Plan will be funded from the proceeds of the 363 Sale.

8. None of the Appellants opposed the 363 Sale.[7] In fact, counsel for the Creditors' Committee voiced enthusiastic support for it at the hearing. None of the Appellants sought to appeal from the 363 Sale Order, nor did any of them seek to stay that Order during the pendency of this Appeal.

9. The 363 Sale cannot now be undone. The assets conveyed to the Buyers cannot now be recovered back from them. Those assets include the RMEs obtained

[6] Annexed hereto as *Exhibit 3* is a copy of an 8-K published by Adelphia with respect to the Term Sheet.

[7] The Creditors' Committee and Huff initially objected on unrelated grounds, but later withdrew their objections.

from the Rigas Family (via the Government) under the Settlement.

10. In addition to the foregoing, numerous other events and actions have transpired since the entry of the unstayed 9019 Order, as set forth below.

11. Appellants neither objected nor sought a stay when the Debtors, consistent with the 9019 Order, ceded operational control over Coudersport Television Cable Company and Bucktail Broadcasting Corporation (collectively, the "*Rigas Retained Entities*") to the Rigas Family.

12. Appellants neither objected nor sought a stay when the Debtors withdrew their action against the Rigas Family seeking to impose a constructive trust over the RMEs.

13. Appellants neither objected nor sought a stay when the SEC withdrew its proof of claim against the Debtors seeking estimated claims of $5 billion (exclusive of penalties).

14. Appellants neither objected nor sought a stay when the DOJ ceased pursuit of its criminal investigation of the Debtors and agreed in writing not to prosecute them.

15. Appellants neither objected nor sought a stay when the Debtors, consistent with the unstayed 9019 Order, permitted the Rigas Family to draw on the Debtors' directors and officers insurance policy to fund the Rigas Family's defense expenses and paid $11.5 million towards the Rigas Family's legal defense fund.

16. Appellants neither objected nor sought a stay when the Rigases, on June 7, 2005, forfeited the RMEs to the DOJ.

17. Appellants neither objected nor sought a stay when the DOJ, from June 7, 2005 to March 29, 2006, conducted forfeiture proceedings with respect to the RMEs.

18. Appellants neither objected nor sought a stay when the DOJ, upon the conclusion of the forfeiture proceedings, delivered the RMEs to the Debtors free and clear of the Rigas Family's interest in and claims to them.

19. Appellants neither objected nor sought a stay when the Debtors, on March 31, 2006, commenced chapter 11 proceedings for the RMEs.

20. Appellants neither objected nor sought a stay when the Debtors, on April 10, 2006, caused the RMEs to participate in the Debtors' debtor-in-possession financing ("*DIP Financing*"), subjecting them to substantial administrative expense obligations, which were repaid on July 31, 2006 upon the closing of the 363 Sale.

21. Appellants neither objected nor sought a stay when the Debtors established a May 1, 2006 bar date for the filing of proofs of claim against the RMEs and, thereafter, began resolving (either consensually or judicially) claims against the RMEs.

22. Appellants neither objected (or later withdrew any initial objection) nor sought a stay when the Debtors, on May 26, 2006, moved before the Bankruptcy Court for authority to consummate the 363 Sale.

23. Appellants neither objected nor sought a stay when the Debtors proposed to obtain an additional nearly $1 billion from the Buyers by including the RMEs in the 363 Sale.

24. Appellants neither objected nor sought a stay when the Debtors, on May 26, 2006, moved before the

Bankruptcy Court to assume and assign certain executory franchises and other executory contract rights (the "*Executory Contracts*") attributable to the RMEs (incurring, in the process, certain monetary and non-monetary cure obligations to the franchise authorities) to enable the Debtors to convey those rights to the Buyers in the 363 Sale.

25. Appellants neither objected nor sought a stay when the Bankruptcy Court, on June 28, 2006, approved the 363 Sale and the assumption and assignment of the Executory Contracts.

26. Appellants neither objected nor sought a stay when the Debtors, on June 5, 2006 proposed the JV Plans nor did they object when the Bankruptcy Court confirmed the JV Plans on June 29, 2006, premised on funding from the proceeds of the 363 Sale.

27. Appellants neither objected nor sought a stay when the Debtors, on July 24, 2006, moved before the Bankruptcy Court to approve a settlement resolving certain remaining issues with respect to the Rigas Retained Entities. Nor did Appellants seek a stay or otherwise object when, on July 28, 2006, the Bankruptcy Court approved that settlement.

28. Appellants neither objected nor sought a stay when the Debtors, on July 31, 2006, consummated the 363 Sale, with the Buyers relying on the validity of the 9019 Order to satisfy certain closing conditions for such sale.[8]

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[8] The sale agreement with each Buyer requires, as a condition to the Buyer's obligation to close, a resolution of the Government's claims pursuant to which no portion of the assets to be conveyed will have any post-closing liability, including risk of criminal prosecution.

29. Appellants neither objected nor sought a stay when the Buyers, also on July 31, 2006, exchanged between themselves certain of the assets purchased from the Debtors in the 363 Sale.

30. Appellants neither objected nor sought a stay when the JV Plans, on July 31, 2006, went effective.

31. Appellants neither objected nor sought a stay when distribution of sale proceeds to creditors and to certain escrow agents funded by the JV Plans began on or about July 31, 2006 (over $1.6 billion to date).

/s/ MARC R. ABRAMS, ESQ.
Marc R. Abrams, Esq.

Sworn to before me on this
7th day of August, 2006

_____
Notary Public

EXHIBIT 1

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11
Case No.: 02-41729(REG)
Jointly Administered

In re:

ADELPHIA COMMUNICATIONS CORPORATION, *et al.*,

Debtors.

ORDER AUTHORIZING (I) SALE OF SUBSTANTIALLY ALL ASSETS OF ADELPHIA COMMUNICATIONS CORPORATION AND ITS AFFILIATED DEBTORS TO TIME WARNER NY CABLE LLC AND TO COMCAST CORPORATION, FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS AND EXEMPT FROM APPLICABLE TRANSFER TAXES; (II) ASSUMPTION AND/OR ASSIGNMENT OF CERTAIN AGREEMENTS, CONTRACTS AND LEASES; AND (III) THE GRANTING OF RELATED RELIEF

Upon the motion of the above-captioned debtors and debtors-in-possession (collectively, other than the Transferred Joint Venture Entities,[1] the "Debtors"), dated May 26, 2006, for entry of an order pursuant to 11 U.S.C. §§ 105(a), 363, 365, and 1146(c) and Fed. R. Bankr. P. 2002, 6004, 6006, and 9014 (a) approving the sale of (i) substantially all of the Debtors' assets pursuant to that certain Asset Purchase Agreement, dated as of April 20, 2005 (as the same has been or may be amended from time to time, the "TW Purchase Agreement") between Adelphia Communications Corporation ("Seller") and Time Warner NY Cable LLC (together with its assignees, as applicable, "TWNY"), and (ii) certain other assets (exclusive of those held by the Transferred Joint Venture Entities) pursuant to that certain Asset Purchase Agreement, between Seller and Comcast Corporation (together with its assignees, as applicable, "Comcast," and together with TWNY, the "Buyers" and individually each, a "Buyer"), dated as of April 20, 2005 (as the same has been or may be amended from time to time, the "Comcast Purchase Agreement," and together with the TW Purchase Agreement, the "Purchase Agreements" and individually each, a "Purchase Agreement"), and the consummation of the transactions contemplated by (i) and (ii) above (the "363 Sale"), (b) authorizing assumption and/or assignment of the Assigned Contracts,[2] and

[1] Capitalized terms not defined herein shall have the meanings ascribed to such terms in the Purchase Agreements (as defined below).

[2] As used herein, the terms:

(a) "Comcast Assigned Contracts" shall mean the Assigned Contracts as defined in Comcast Purchase Agreement, other

(c) granting related relief (the "Motion"); and objections to the Motion (the "Objections") having been filed by the parties listed on Exhibit A hereto; and the Court having granted a portion of the relief requested in the Motion at a hearing held on June 16, 2006 (the "Buyer Provisions Hearing"); and the Court having heard the statements of counsel and the evidence presented in support of the balance of the relief requested in the Motion at a hearing before the Court which commenced on June 27, 2006 (the "363 Hearing"); and upon this Court's October 14, 2005 Order Pursuant to Sections 105(a) and 365 of the Bankruptcy Code Establishing Procedures to Determine Cure Amounts and Deadlines for Objections for Certain Contracts and Leases to be Retained, Assumed and/or Assigned by the Debtors and Granting Related Relief (the "Cure Procedures Order"); and upon that certain Stipulation and Agreed Order with Respect to Second Modified Fourth Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code for Century-TCI and Parnassos Debtors, so ordered by this Court on June 20, 2006; and upon the full and complete record of these chapter 11 cases; and it appearing that the Court has jurisdiction over this matter; and it further appearing that the legal and factual bases set forth in the Motion, at the Buyer Provisions Hearing, and at the 363 Hearing establish just cause for the relief granted herein; and it further appearing that the relief requested in the Motion is in the best interests of the Debtors and the

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than those contracts assumed or retained by a Transferred Joint Venture Entity under the JV Plan,

(b) "TWNY Assigned Contracts" shall mean the Assigned Contracts as defined in the TW Purchase Agreement, and

(c) "Assigned Contracts" shall mean the TWNY Assigned Contracts and Comcast Assigned Contracts, collectively.

Transferred Joint Venture Entities (collectively, the "Debtor Parties") their creditors, and all other parties in interest in these chapter 11 cases; therefore,

THE COURT HEREBY FINDS AND DETERMINES THAT:

A. The findings and conclusions set forth herein constitute the Court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052, made applicable to this proceeding pursuant to Fed. R. Bankr. P. 9014.

B. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

C. The Court has jurisdiction to grant the relief requested in the Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

D. The statutory predicates for the relief sought in the Motion are sections 105(a), 363, 365, and 1146(c) of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code"), as supplemented by Rules 2002, 6004, and 6006 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

E. As evidenced by the affidavits of service and publication filed with the Court, and based on the representations of counsel at the 363 Hearing, (i) proper, timely, adequate and sufficient notice of the Motion, the 363 Hearing, the 363 Sale, and the assumption and assignment of the Assigned Contracts has been provided in accordance with sections 102(1), 363 and 365 of the Bankruptcy Code and Bankruptcy Rules 2002(a), 6004(a) and 6006(c), and/or the Cure Procedures Order,

and in compliance with this Court's May 26, 2006 Order to Show Cause (I) Scheduling Hearings to Consider Entry of Orders Approving, Among Other Things, (A) New Provisions for Termination and for the Payment or Crediting of the Breakup Fee, and (B) The Sale of Substantially all Assets of Adelphia Communications Corporation and its Affiliated Debtors Free and Clear of Liens, Claims, Encumbrances, and Interests and Exempt from Applicable Transfer Taxes; and (II) Approving Form and Manner of Notice Thereof (the "Scheduling Order"), (ii) such notice was good and sufficient and appropriate under the particular circumstances, and reasonably calculated to reach and apprise all holders of Claims and Interests (as hereafter defined) about the 363 Sale and the assumption and/or assignment of the Assigned Contracts, and (iii) no other or further notice of the Motion, the 363 Hearing, the 363 Sale, or the assumption and/or assignment of the Assigned Contracts shall be required.

F. A reasonable opportunity to object or be heard with respect to the Motion and the relief requested therein has been afforded to all interested persons and entities in these cases.

G. Notice has been given to: (i) the US Trustee; (ii) counsel for the Committees; (iii) counsel for the agents for the Debtors Parties' prepetition and postpetition lenders; (iv) the SEC; (v) the United States Attorney's Office for the Southern District of New York; (vi) the DoJ; (vii) the FCC; (viii) the FTC; (ix) the IRS; (x) all relevant federal, state and local taxing authorities at their statutory addresses; (xi) all parties who have filed a request for service of all pleadings pursuant to and in accordance with the Bankruptcy Rule 2002 as of the day prior to service of the Motion; (xii) all parties that are

required to receive notice pursuant to the Administrative Procedures Order; (xiii) each of the Buyers; (xiv) all non-Debtor parties to executory contracts, unexpired leases, and other agreements with the Debtors (entered into before or after the petition date of the applicable Debtor); and (xv) all known creditors of the Debtor Parties.[3] Furthermore, the Debtor Parties published, pursuant to Bankruptcy Rule 2002(d) and 2002(l), and in compliance with the Scheduling Order, the Sale Notice in: (i) *The New York Times* (National Edition), *The Wall Street Journal* (National Edition); and (ii) a major regional newspaper in each of the following cities: Boston; Buffalo; West Palm Beach; Cleveland; Denver; and Los Angeles, as well as posting the notice of sale electronically on their website, *www.adelphia.com*.

H. As demonstrated by: (i) the testimony and other evidence proffered or adduced at the 363 Hearing; and (ii) the representations of counsel made on the record at the 363 Hearing, the Debtor Parties have marketed the assets being sold to the Buyers in the 363 Sale (collectively, the "Transferred Assets")[4] and conducted the Sale Process (as hereafter defined) in a noncollusive, fair and good faith manner that was in compliance with that certain order of this Court entered on October 22, 2004, establishing bidding procedures and bid protections in

[3] To the extent the Debtor Parties have previously served any party identified herein via electronic mail, such service of the Sale Notice (as defined in the Motion) constitutes good and sufficient notice thereof.

[4] Subject to the remaining provisions of the applicable Purchase Agreements, the term "Transferred Assets" refers to all assets included in Section 2.1 of the Time Warner Purchase Agreement and Section 2.3 of the Comcast Purchase Agreement (exclusive of those held by the Transferred Joint Venture Entities).

connection with the direct or indirect sale of substantially all of the Debtors' assets, and as supplemented by those certain orders of this Court entered on April 21, 2005 and June 16, 2006 (collectively, the "Bid Protections Orders"). A reasonable opportunity has been given to any interested party to make a higher and better offer for the Transferred Assets.

I. The Debtor Parties diligently and in good faith marketed the Transferred Assets to obtain the highest and best offer for their businesses. The Debtor Parties conducted a two-phase process in which they (i) solicited initial indications of interest, and (ii) organized a formal bidding process in which 22 of the 45 parties that indicated interest were invited to participate (the "Sale Process"). After 15 final bids were received on January 31, 2005, the Debtor Parties reviewed extensive presentations and analyses by their financial advisors and evaluated the submitted bids. The Debtor Parties deemed the bid submitted by the Buyers the bid most likely to maximize the value of distributable proceeds to the Debtor Parties' stakeholders. The Debtor Parties concluded that consummation of such transaction would yield a more favorable mix of currency at a premium over the hypothetical total enterprise value than would be achieved under a standalone plan that would provide for the issuance of publicly traded equity securities by the reorganized Debtors.

J. Therefore, the terms and conditions set forth in each Purchase Agreement, and the 363 Sale to the Buyers pursuant thereto, each are fair and reasonable and the purchase price payable pursuant to each Purchase Agreement collectively constitutes the highest and best offer obtainable for the Transferred Assets.

K. Each of the Debtor Parties, as applicable, (i) has full corporate or other power to execute, deliver and perform its obligations under each of the Purchase Agreements and all other documents contemplated thereby or entered into in connection therewith, and the sale of the Transferred Assets by the Debtors has, in each case, been duly and validly authorized by all necessary corporate or similar action, (ii) has all of the corporate or other power and authority necessary to consummate the transactions contemplated by each of the Purchase Agreements, and such other documents contemplated thereby or entered into in connection therewith, and (iii) has taken all action necessary to authorize and approve each of the Purchase Agreements and such other documents contemplated thereby and the consummation by them of the transactions contemplated thereby or entered into in connection therewith. No third-party consents or approvals, other than those expressly provided for in the applicable Purchase Agreement, are required for the Debtor Parties to consummate such transactions.

L. Approval of the Seller's entry into each of the Purchase Agreements and the consummation of the 363 Sale at this time are in the best interests of the Debtors, their creditors, their estates, and other parties in interest.

M. The Debtors have demonstrated compelling circumstances and a good, sufficient, and sound business purpose and justification for the 363 Sale prior to, and outside of, although in contemplation of, a plan of reorganization in that, among other things:

(1) The 363 Sale enables the Debtors to yield a substantial control premium and preserve the highest value for the Debtors' assets for the Debtors' creditors, and

(2) In light of risks associated with the ability to confirm the Proposed Plan (as defined below) in advance of each Buyer's rights to terminate the Purchase Agreement to which it is a party, the 363 Sale is crucial to preserving value for the Debtors' estates.

N. The Debtors' Modified Fourth Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, dated April 28, 2006 (as it may be amended, modified or supplemented, the "Proposed Plan") that is currently pending in the Debtors' chapter 11 cases and for which votes are being solicited pursuant to disclosure materials previously approved by this Court contemplates the sale of the Debtors' assets pursuant to the Purchase Agreements (prior to giving effect to Amendment No. 2 to each Purchase Agreement, dated June 21, 2006) and the distribution of, among other things, Class A Common Stock of Time Warner Cable Inc. ("TWC") in exchange for Claims (as that term is defined in the Bankruptcy Code) against the Debtors. In light of the risks associated with consummation of the Proposed Plan, the impending Outside Date of the Purchase Agreements, and the possible loss of the substantial control premium if the Transactions are not consummated, the 363 Sale is being consummated outside of the context of the Proposed Plan in order to preserve the value of the Debtors' estates. The consummation of the 363 Sale pursuant to this Order is an inextricable part of the Proposed Plan. Accordingly, solely for purposes of sections 1145 and 1125 of the Bankruptcy Code, TWC shall be deemed a "successor" of the Debtors.

O. Each of the Purchase Agreements and the 363 Sale were negotiated, proposed and entered into by the Debtor Parties and each of the Buyers without collusion, in good faith, and from arm's-length bargaining posi-

tions. Neither the Debtor Parties nor either Buyer has engaged in any conduct that would cause or permit either Purchase Agreement or any other related agreement to be avoided under section 363(n) of the Bankruptcy Code.

P. Each of the Buyers is a good faith purchaser under section 363(m) of the Bankruptcy Code and, as such, is entitled to all of the protections afforded thereby. In the absence of a stay pending appeal, each Buyer will be acting in good faith within the meaning of section 363(m) of the Bankruptcy Code in closing the 363 Sale at any time after entry of this Order, notwithstanding the provisions of Bankruptcy Rule 6004(g).

Q. Neither TWNY nor Comcast is an "insider" of any of the Debtors, as that term is defined under section 101 of the Bankruptcy Code, with the exception of Comcast in its capacity as an affiliate of a partner in the Transferred Joint Venture Parents. The consideration provided by each Buyer pursuant to its Purchase Agreement (i) is fair and reasonable, (ii) is the highest and best offer for the Transferred Assets being purchased by such Buyer, (iii) will provide a greater recovery to the Debtor Parties' estates than would be provided by any other available alternative, and (iv) constitutes reasonably equivalent value and fair consideration under the Bankruptcy Code and under the laws of the United States, any state, territory, possession, or the District of Columbia.

R. The sale of the TWNY Transferred Assets to TWNY and the sale of the Comcast Transferred Assets to Comcast will each be a legal, valid, and effective transfer of the TWNY Transferred Assets and the Comcast Transferred Assets, respectively, and, except for the liabilities expressly assumed by a Buyer pursuant to its

Purchase Agreement, other than those liabilities to be retained by a Transferred Joint Venture Entity, (with respect to such Buyer, the "Assumed Sale Liabilities"), will vest each Buyer with all right, title, and interest of the Debtors to the applicable Transferred Assets free and clear of claims against and interests in the Debtors and liens or other Encumbrances against the Transferred Assets (collectively, the "Claims and Interests" or if the context so requires, the "Claims or Interests"), including, but not limited to, (1) those that purport to give any party a right or option to effect any forfeiture, modification, right of first refusal, or termination of any Debtor's or either Buyer's interest in the Transferred Assets, or any similar rights, (2) those relating to Taxes or assessments arising under or out of; in connection with, or in any way relating to the ownership, operation, or use of the Transferred Assets prior to the consummation of the 363 Sale (the "Closing"), (3)(a) those arising under all mortgages, deeds of trust, security interests, conditional sale or other title retention agreements, pledges, liens, judgments, demands, encumbrances, rights of first refusal or charges of any kind or nature, if any, including, but not limited to, any restriction on the use, voting, transfer, receipt of income or other exercise of any attributes of ownership and (b) all debts arising in any way in connection with any agreements, acts, or failures to act, of the Debtors or the Debtors' predecessors or affiliates, including without limitation, Claims, obligations, liabilities, demands, guaranties, options, rights, contractual or other commitments, restrictions, interests and matters of any kind and nature, whether known or unknown, contingent or otherwise, whether arising prior to or in connection with or subsequent to the commencement of these chapter 11 cases, and whether imposed by agreement, understand-

ing, law, equity or otherwise, including, but not limited to, claims otherwise arising under doctrines of successor liability, (4) any employment or labor agreements, (5) any pension, welfare, compensation, or other employee benefit plans, agreements, practices, and programs, including, without limitation, any pension plan of any Debtor, (6) any other employee, worker's compensation, occupational disease or unemployment or temporary disability related Claim, including, without limitation, claims that might otherwise arise under or pursuant to (a) the Employee Retirement, Income, Security Act of 1974, as amended, (b) the Fair Labor Standards Acts, as amended, (c) Title VII of the Civil Rights Act of 1964, as amended, (d) the Federal Rehabilitation Act of 1973, as amended, (e) the National Labor Relations Act, as amended, (f) the Worker Adjustment and Retraining Act of 1988, as amended, (g) the Age Discrimination and Employee Act of 1967, as amended or (h) the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended, (7) any products liability or similar Claims, whether pursuant to any state or federal laws or otherwise, (8) subject to decretal paragraph 10 hereof, environmental Claims or liens arising from conditions existing on or prior to the Closing (including, without limitation, the presence of hazardous, toxic, polluting, or contaminating substances or waste) that may be asserted on any basis, including, without limitation, under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.* or similar state statute, (9) any bulk sales or similar law, and (10) any tax statutes or ordinances, including, without limitation, the Internal Revenue Code of 1986, as amended. As used herein (i) the term "TWNY Transferred Assets" shall mean the Transferred Assets being sold to TWNY under the TWNY Purchase Agreement, and (ii) the term

"Comcast Transferred Assets" shall mean the Transferred Assets being sold to Comcast under the Comcast Purchase Agreement.

S. Neither Buyer would have entered into its Purchase Agreement and neither Buyer would consummate the transactions contemplated thereby, thus adversely affecting the Debtors, their estates, and their creditors, if the sale of the applicable Transferred Assets to such Buyer were not, except for the applicable Assumed Sale Liabilities, free and clear of all Claims and Interests of any kind or nature whatsoever, or if such Buyer would, or in the future could, be liable for any of the Claims and Interests.

T. The Debtors may sell the Transferred Assets free and clear of all Claims and Interests of any kind or nature whatsoever, because in each case, one or more of the standards set forth in section 363(f)(1)-(5) of the Bankruptcy Code has been satisfied. Those holders of Claims and Interests and non-Debtor parties to Assigned Contracts who did not object, or who withdrew their objections, to the Motion are deemed to have consented pursuant to section 363(f)(2) of the Bankruptcy Code. Those holders of Claims and Interests and non-Debtor parties to Assigned Contracts who did object fall within one or more of the other subsections of 363(f) of the Bankruptcy Code and are adequately protected by having their Claims and Interests that are secured by liens, security interests and similar encumbrances, if any, attach to the net proceeds of the 363 Sale ultimately attributable to the property against or in which they assert such Claim or Interest, with the same validity, priority and effect that existed immediately prior to the consummation of the 363 Sale and subject to any and all rights, claims and defenses that the Debtors may have with respect thereto.

U. The 363 Sale is critically necessary and a prerequisite to confirm and consummate the JV Plan and a chapter 11 plan or plans (including the Proposed Plan) for the Debtors, and is made in contemplation of such plan or plans. Accordingly, the 363 Sale is a transfer pursuant to section 1146(c) of the Bankruptcy Code, which shall not be taxed under any law imposing a stamp, transfer, recording or any similar tax.

V. The Debtors have demonstrated that it is an exercise of their sound business judgment to assume and/or assign and sell the TWNY Assigned Contracts to TWNY and the Comcast Assigned Contracts to Comcast in connection with the Closing, and the assumption and/or assignment and sale of the Assigned Contracts is in the best interests of the Debtors, their estates, and their creditors. The Assigned Contracts being sold and assigned to, and the liabilities being assumed by, each Buyer are an integral part of the Transferred Assets being purchased by such Buyer and, accordingly, such assumption and/or assignment of the applicable Assigned Contracts is reasonable and enhances the value of the Debtors' estates.

W. The Debtors have cured and/or provided adequate assurance of cure of any undisputed cure obligations, to the extent required by section 365 of the Bankruptcy Code and applicable orders of this Court (including the Cure Procedures Order) ("Cure Costs"), and will segregate, on or before the Closing, any disputed monetary Cure Costs pending the resolution of any such dispute by this Court or mutual agreement of the parties. Any non-Debtor parties to executory contracts and unexpired leases who have objected to the monetary Cure Costs are protected by having any disputed Cure Cost segregated upon the Closing.

NOW THEREFORE, THE COURT HEREBY ORDERS, ADJUDGES, AND DECREES AS FOLLOWS:

General Provisions

1. The Motion, to the extent not already granted by the Buyer Provisions Order, is granted in all respects, as further described herein.

2. The Objections to the Motion or the relief requested therein that have not been withdrawn, waived, or settled, and all reservations of rights included in such Objections, except as explicitly preserved on the record of the 363 Hearing, are overruled on the merits.

3. Except for (a) Contract Objections listed on Exhibit B hereto and (b) Contract Objections relating to a Contract Notice for which the Contract Objection Deadline has not yet passed, which, in each case, shall remain subject to further order or decision of this Court to the extent not withdrawn, waived or settled, all Contract Objections are hereby overruled on the merits.[5]

Approval of the Purchase Agreements

4. Each of the Purchase Agreements, and all of the documents, agreements (including but not limited to (i) the Registration Rights and Sale Agreement between Adelphia Communications Corporation ("ACC") and TWC (the "Adelphia Registration Rights Agreement"), (ii) the Letter Agreement between, among others, Comcast, ACC, and TWC dated June 21, 2006 relating to the

[5] The provisions of the Cure Procedures Order that refer to the "Effective Date of the Plan" shall be deemed to refer equally to the Effective Date of the JV Plan (as defined therein) and/or the Closing Date.

priority of Comcast's registration rights (the "Comcast Priority Letter Agreement), and (iii) the Escrow Agreement and the Transfer Tax Escrow Agreement to be entered into pursuant to each of the Purchase Agreements) and transactions contemplated thereby or entered into in connection therewith be, and hereby are, approved in all respects.

5. Pursuant to section 363(b) of the Bankruptcy Code, the Debtor Parties are authorized to perform their obligations under and comply with the terms of each of the Purchase Agreements and all other documents and agreements contemplated thereby or entered into in connection therewith, including, but not limited to, the Adelphia Registration Rights Agreement, the Comcast Priority Letter Agreement and the Escrow Agreement and the Transfer Tax Escrow Agreement to be entered into pursuant to each of the Purchase Agreements, and to consummate the 363 Sale, pursuant to and in accordance with the terms and conditions of the Purchase Agreements and such documents and agreements.

6. The Debtor Parties are authorized and empowered to execute and deliver, and are empowered to perform under, consummate and implement, the Purchase Agreements and all other documents and agreements contemplated thereby or entered into in connection therewith, including, but not limited to, the Adelphia Registration Rights Agreement, the Comcast Priority Letter Agreement, and the Escrow Agreement and the Transfer Tax Escrow Agreement to be entered into pursuant to each of the Purchase Agreements, together with all additional instruments and documents that the Debtor Parties or any Buyer deem necessary or appropriate to implement each of the Purchase Agreements and to effectuate the 363 Sale, and to take all further actions as may be rea-

sonably necessary or desirable for the purpose of assigning, transferring, granting, conveying and conferring to each Buyer or reducing to its possession, the Transferred Assets being sold to such Buyer in the 363 Sale, or as may be necessary or appropriate to the performance of the obligations contemplated by the applicable Purchase Agreements.

7. This Order and each of the Purchase Agreements shall be binding in all respects upon all creditors of and holders of equity interests in any Debtor Party (whether known or unknown), any holders of Claims and Interests, all non-Debtor parties to the Assigned Contracts, all applicable successors and assigns of any Buyer, the Debtor Parties, and any subsequent trustees appointed in the Debtor Parties' chapter 11 cases or upon a conversion to chapter 7 under the Bankruptcy Code and shall not be subject to rejection. Nothing contained in any chapter 11 plan confirmed in these chapter 11 cases or the confirmation order confirming any such chapter 11 plan shall conflict with or derogate from the provisions of any of the Purchase Agreements and the other agreements and documents entered into in connection therewith (including the Adelphia Registration Rights Agreement, the Comcast Priority Letter Agreement and the Escrow Agreement and the Transfer Tax Escrow Agreement to be entered into pursuant to each of the Purchase Agreements) or this Order and no such plan or confirmation order shall discharge the obligations and Liabilities of the Debtors under such agreements and documents.

8. Except for the applicable Assumed Sale Liabilities, pursuant to sections 105(a) and 363(f) of the Bankruptcy Code, the TWNY Transferred Assets shall be transferred to TWNY, and the Comcast Transferred Assets shall be

transferred to Comcast, and upon the Closing and the DIP Payoff (as defined below) shall be, free and clear of all Claims and Interests of any kind or nature whatsoever (including, but not limited to, those described in paragraph R of this Order), and all such Claims and Interests that are secured by liens, security interests and similar encumbrances of any kind or nature whatsoever shall attach to the net proceeds of the 363 Sale in the order of their priority, with the same validity, force, and effect which they now have as against the Transferred Assets, subject to any rights, claims or defenses any of the Debtor Parties may possess with respect thereto.

9. Except for Assumed Sale Liabilities, as applicable, all Persons, including, but not limited to, all holders of debt instruments, equity security holders, governmental, tax, and regulatory authorities, lenders, trade and other creditors, holding Claims or Interests of any kind or nature whatsoever against a Debtor or the Transferred Assets (whether legal or equitable, secured or unsecured, matured or unmatured, contingent or non-contingent, senior or subordinated), arising under or out of, in connection with, or in any way relating to, a Debtor, the Transferred Assets, the operation of the Transferred Assets prior to the Closing, or the 363 Sale are forever barred, estopped, and permanently enjoined from asserting against any Buyer, its affiliates, successors or assigns, its property, or the Transferred Assets, each such Person's Claims and Interests.

10. Nothing in this Order or the Purchase Agreements shall be construed to release, discharge, enjoin or preclude the enforcement of any environmental liability to the extent arising or continuing post-Closing to a governmental unit to which any entity would be subject as the owner or operator of property after the Closing.

11. The sale of the TWNY Transferred Assets to TWNY and the Comcast Transferred Assets to Comcast pursuant to the applicable Purchase Agreement constitute legal, valid, and effective transfers of the TWNY Transferred Assets and the Comcast Transferred Assets, respectively, and shall vest the applicable Buyer with all right, title, and interest of the Debtors in and to the Transferred Assets being purchased by the respective Buyer free and clear of all Claims or Interests of any kind or nature whatsoever other than the applicable Assumed Sale Liabilities. Notwithstanding anything contained herein to the contrary, the Transferred Assets will vest in the applicable Buyer subject to any Permitted Encumbrances as provided in and permitted by the applicable Purchase Agreement; *provided, however*, that Permitted Encumbrances shall exclude (a) such Encumbrances that are released and/or removed from the Transferred Assets pursuant to this Order and sections 105, 363 and other applicable provisions of the Bankruptcy Code, and (b) for the avoidance of doubt, Permitted Encumbrances securing financial obligations that are not Assumed Sale Liabilities of the applicable Buyer. The applicable Transferred Investments shall be transferred to the applicable Buyer free and clear of all Encumbrances other than Encumbrances set forth in the applicable Investment Documents.

12. If any Person that has filed financing statements, mortgages, mechanic's liens, lis pendens, or other documents or agreements evidencing Claims or Interests in a Debtor (with respect to a Transferred Asset) or the Transferred Assets shall not have delivered to the Debtors prior to the Closing, in proper form for filing and executed by the appropriate parties, termination statements, instruments of satisfaction, releases of all Claims or Interests which the Person has with respect to

the Debtors (with respect to a Transferred Asset) or the Transferred Assets, then (a) the Debtors and the applicable Buyer are hereby authorized and empowered to execute and file such statements, instruments, releases and other documents on behalf of such Person with respect to any Debtor (with respect to the Transferred Assets) or the applicable Transferred Assets and (b) each Buyer is hereby authorized to file, register, or otherwise record a certified copy of this Order, which shall constitute conclusive evidence of the release of record and otherwise, of all Claims or Interests in the Debtors (with respect to the Transferred Assets) or the Transferred Assets of any kind or nature whatsoever.

13. On the Closing, each of the Debtors' creditors and any other holder of Claims or Interests shall be deemed to have authorized each Buyer to execute such documents and take all other actions as may be necessary to release Claims or Interests in the applicable Transferred Assets purchased by such Buyer, if any, as such Claims or Interests may have been recorded or may otherwise exist.

Use of Proceeds

14. Subsequent to the DIP Payoff (as defined below), which shall occur contemporaneously with the Closing, all remaining net proceeds from the Transaction shall be deposited in the Court Supervised Fund. Such remaining proceeds shall be used to fund required distributions and reserves under the JV Plan and otherwise shall be distributed to creditors in accordance with one or more further orders of this Court. "DIP Payoff' means the payment in Cash to the DIP Agent, for the benefit of the holders of all Claims against a Debtor arising pursuant

to the DIP Facility, including for "Obligations" (as such term is defined in the DIP Facility) (such Claims hereinafter referred to as "DIP Lender Claims"), in full and complete satisfaction of all DIP Lender Claims, the amount of all DIP Lender Claims; provided that (a) outstanding letters of credit issued under the DIP Facility shall be cash-collateralized or supported by back-to-back letters of credit in an amount equal to 110% of the undrawn face amount of the outstanding letters of credit in accordance with the terms of the DIP Facility (collectively, "Cash-Collateralized") and (b) any DIP Lender Claims that do not arise until after the Closing shall be paid in full by the applicable Debtor pursuant to the terms of the DIP Facility. Without limiting the foregoing, and notwithstanding anything herein to the contrary, once the DIP Lender Claims (other than those arising after the Closing) have been paid in full in Cash (or Cash-Collateralized in the case of outstanding letters of credit), all Liens on property of the Debtors with respect to the DIP Lender Claims shall automatically, without further action by the Debtors, the Buyers, the DIP Lenders or the DIP Agents, be deemed released, and the DIP Lenders and the DIP Agents shall take all reasonable actions at the Debtors' sole expense to confirm the removal of any Liens on the properties and assets of the Debtors or the Buyers securing the DIP Lender Claims.[6]

Assumption and Assignment to the Buyers of Assigned Contracts

15. Pursuant to section 365 of the Bankruptcy Code and subject to and conditioned upon the Closing, the

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[6] Capitalized terms in this paragraph 14 not defined in this Order shall have the meanings ascribed to such terms in the JV Plan

Debtors' assumption and assignment to (1) TWNY of the TWNY Assigned Contracts and to Comcast of the Comcast Assigned Contracts, and (2) TWNY's assumption of the TWNY Assigned Contracts and Comcast's assumption of the Comcast Assigned Contracts on the terms of the applicable Purchase Agreement, are hereby approved, and the requirements of section 365(b)(1) of the Bankruptcy Code with respect thereto are hereby deemed satisfied.

16. The Debtors are hereby authorized and empowered in accordance with sections 105(a), 363 and 365 of the Bankruptcy Code to (a) assume and/or assign and sell to each Buyer, effective upon Closing, the Assigned Contracts being assigned to such Buyer pursuant to the applicable Purchase Agreement free and clear of all Claims or Interests of any kind or nature whatsoever other than the Assumed Sale Liabilities being assumed by such Buyer, and (b) execute and deliver to each Buyer such documents or other instruments as such Buyer reasonably deems necessary to assign and transfer such Assigned Contracts and Assumed Sale Liabilities to such Buyer.

17. (a) Upon the Closing, (i) the TWNY Assigned Contracts shall be transferred and assigned to, and following the Closing remain in full force and effect for, the benefit of the TWNY, and (ii) the Comcast Assigned Contracts shall be transferred and assigned to, and following the Closing remain in full force and effect for, the benefit of Comcast, in each case notwithstanding any provision in any such Assigned Contract (including those of the type described in sections 365(b)(2) and (f) of the Bankruptcy Code) that prohibits, restricts, or conditions such assignment or transfer; (b) the Debtors may assume and/or assign and sell each Assigned Contract in

accordance with sections 105, 363 and 365 of the Bankruptcy Code and the Cure Procedures Order, and any provisions in any Assigned Contract that prohibit, restrict or condition the assignment of such agreement or allow the non-Debtor party to an Assigned Contract to terminate, recapture, impose any penalty, condition renewal or extension, or modify any term or condition upon the assignment of such Assigned Contract, constitute unenforceable anti-assignment provisions which are void and of no force and effect; (c) the provisions of the Cure Procedures Order are hereby incorporated and all other requirements and conditions under sections 363 and 365 of the Bankruptcy Code for the assumption by the Debtors and/or assignment to the applicable Buyer of each such agreement have been satisfied; and (d) upon the Closing, in accordance with sections 363 and 365 of the Bankruptcy Code and the Cure Procedures Order, each of the Buyers shall be fully and irrevocably vested in all right, title and interest of each Assigned Contract assigned to such Buyer.

18. All defaults or other obligations of any Debtor under any Assigned Contract arising or accruing prior to the Closing (without giving effect to any acceleration clauses or any default provisions of the kind specified in section 365(b)(2) of the Bankruptcy Code) shall be cured by the applicable Debtor at Closing or as soon thereafter as practicable by payment of the Cure Costs, in accordance with the Cure Procedures Order and the applicable Purchase Agreement. No Buyer (or any affiliate of such Buyer) shall have any Liability arising or accruing prior to the date of the Closing, except as otherwise expressly provided in the applicable Purchase Agreement. Pursuant to section 365(k) of the Bankruptcy Code, the Debtors and their estates shall not have any Liability for any default or other obligation under an

Assigned Contract arising or occurring after the Closing, and all non-Debtor parties to such Assigned Contracts are forever barred and estopped from asserting any such breaches against the Debtors, their successors or assigns, their property or their assets or estates.

19. Pursuant to the Cure Procedures Order, each non-Debtor party to an Assigned Contract hereby is forever barred, estopped, and permanently enjoined from: (i) asserting against the Debtors (except for timely asserted Cure Costs) or any Buyer, or the property of any of them (including the Transferred Assets), any default arising prior to or existing as of the Closing or, against any Buyer (or any affiliate of such Buyer), any counterclaim, defense, setoff or any other Claim asserted or assertable against a Debtor; and (ii) imposing or charging against any Buyer (or any affiliate of such Buyer) any rent accelerations, assignment fees, increases or any other fees as a result of the Debtors' assumption and assignment to such Buyer of the applicable Assigned Contracts. The validity of such assumption and assignment of Assigned Contracts shall not be affected by any dispute between any Debtor and any non-Debtor party to an Assigned Contract.

20. Notwithstanding anything to the contrary herein (other than protections afforded pursuant to section 365(k) of the Bankruptcy Code and paragraph 18 herein), nothing in this Order shall release or discharge the Debtors from any Liability or obligation to either Buyer under either Purchase Agreement with respect to an Assigned Contract.

21. Notwithstanding anything to the contrary herein, nothing in this Order shall release or discharge a Buyer from any Liability or obligation to the Seller under

either Purchase Agreement with respect to an Assigned Contract.

Additional Provisions

22. The consideration provided by each Buyer for the Transferred Assets purchased by such Buyer pursuant to the applicable Purchase Agreement shall be deemed to constitute reasonably equivalent value and fair consideration under the Bankruptcy Code and under the laws of the United States, any state, territory, possession, or the District of Columbia.

23. The consideration provided by each Buyer for the Transferred Assets purchased by such Buyer pursuant to the applicable Purchase Agreement is fair and reasonable and the 363 Sale may not be avoided under section 363(n) of the Bankruptcy Code.

24. This Order (a) shall be effective as a determination that, except for the applicable Assumed Sale Liabilities, at the Closing, all Claims and Interests of any kind or nature whatsoever existing as to the Debtors or Transferred Assets prior to the Closing have been unconditionally released, discharged and terminated as to each of the Buyers (including their respective successors and assigns) and their respective properties (including, without limitation, the Transferred Assets), and that the conveyances described herein have been effected, and (b) shall be binding upon and shall govern the acts of all entities, including, without limitation, all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, administrative agencies, governmental departments, secretaries of state, federal, state, and local officials, and all other Persons who may be required by operation of law,

the duties of their office, contract, or otherwise, to accept, file, register or otherwise record or release any documents or instruments, or who may be required to report or insure any title or state of title in or to any of the Transferred Assets.

25. Except as provided in the applicable Purchase Agreement, after the Closing, the Debtors and their estates shall have no further liabilities or obligations with respect to any Assumed Sale Liabilities and all holders of such Claims are forever barred and estopped from asserting such Claims against the Debtors, their successors or assigns, their property or their assets or estates.

26. Each and every federal, state, and local governmental agency or department is hereby directed to accept any and all documents and instruments necessary and appropriate to record the 363 Sale.

27. The so-called "bulk sale" laws in all applicable jurisdictions are waived or inapplicable as to the Transactions and such Transactions are hereby deemed to be under or in contemplation of a plan to be confirmed under section 1129 of the Bankruptcy Code.

28. Except as otherwise expressly provided in the applicable Purchase Agreement, each Buyer shall have no Liability to pay wages, bonuses, severance pay, benefits (including, without limitation, contributions or payments on account of any under-funding with respect to any and all pension plans) or any other payment with respect to employees or former employees of the Debtors. Except as otherwise expressly provided in the applicable Purchase Agreement, each Buyer shall have no Liability with respect to any collective bargaining agreement, employee pension plan, employee welfare or

retention, benefit and/or incentive plan to which any Debtor is a party and relating to the Transferred Assets (including, without limitation, arising from or related to the rejection or other termination of any such agreement), and no Buyer shall in any way be deemed a party to or assignee of any such agreement, and no employee of such Buyer shall be deemed in any way covered by or a party to any such agreement, and except for Assumed Sale Liabilities of a Buyer and except as otherwise expressly provided in the applicable Purchase Agreement, all parties to any such agreement are hereby enjoined from asserting against a Buyer any and all Claims arising from or relating to such agreement. All notices, if any, required to be given to the Debtors' employees pursuant to the Workers Adjustment and Relocation Adjustment Act, or any similar federal or state law, shall be the sole responsibility of the party set forth in the applicable Purchase Agreement.

29. Any amounts that become payable by the Debtors to any Buyer (or any affiliate of such Buyer) (a) pursuant to Section 2.6(f) of the TW Purchase Agreement or Section 2.8(f) of the Comcast Purchase Agreement (in each case, other than to the extent paid from the applicable Escrow Account), (b) with respect to Incremental Transfer Taxes pursuant to Sections 5.7(c) and 7.8 of the TW Purchase Agreement or Sections 5.4(c) and 7.8 of the Comcast Purchase Agreement (in each case other than to the extent paid from the applicable Transfer Tax Escrow Account or the applicable Escrow Account), (c) Section 5.13(j) of the TW Purchase Agreement or Section 5.11(j) of the Comcast Purchase Agreement, (d) the Adelphia Registration Rights Agreement, (e) the Escrow Agreement to be entered into pursuant to each of the Purchase Agreements, (f) the Transfer Tax Escrow Agreement to be entered into pursuant to each of the

Purchase Agreements or (g) as otherwise expressly agreed in writing by Seller on its own behalf or on behalf of any Debtor, shall (i) constitute administrative expenses of the Debtors' estates under sections 503(b)(1) and 507(a)(1) of the Bankruptcy Code and (ii) be paid by the Debtors at the time and in the manner provided for in the applicable Purchase Agreement or related documents and agreements without further court order.

30. All Persons who are in possession of some or all of the Transferred Assets on the Closing are hereby directed to surrender possession of the Transferred Assets to the applicable Buyer at Closing.

31. Except for the Assumed Sale Liabilities, no Buyer shall have any Liability or responsibility for any Liability of the Debtors arising under or related to the Transferred Assets. Without limiting the generality of the foregoing and, except for the Assumed Sale Liabilities assumed by it or as otherwise specifically provided herein and in the applicable Purchase Agreement or any other agreement entered into by it in connection therewith, no Buyer shall be liable for any Claims against the Debtors or any of their predecessors or Affiliates, and no Buyer shall have successor or vicarious liabilities of any kind or character, including, but not limited to, under any theory of antitrust, environmental, successor or transferee liability, labor law, de facto merger, or substantial continuity, whether known or unknown as of the Closing, now existing or hereafter arising, whether fixed or contingent, with respect to the Debtors or any Liabilities of the Debtors arising prior to the Closing, including, but not limited to, Liabilities on account of any Taxes arising, accruing, or payable under, out of, in connection with, or in any way relating to the operation of the Transferred Assets prior to the Closing. The con-

sideration given by each Buyer shall constitute valid and valuable consideration for the releases of any potential claims of successor liability of such Buyer, releases which the Court holds shall be deemed to have been given in favor of such Buyer by all holders of Claims or Interests against or in the Debtors or their respective assets.

32. Under no circumstances shall a Buyer be deemed a successor to any Liability of or to the Debtors for any Claim or Interest against or in the Debtors or the Transferred Assets. Except for the Assumed Sale Liabilities, as applicable, the sale, transfer, assignment and delivery of the Transferred Assets shall not be subject to any Claims or Interests. Except for the Assumed Sale Liabilities, as applicable, all Persons holding Claims or Interests against or in the Debtors or the Transferred Assets of any kind or nature whatsoever (including, but not limited to, the Debtors and/or their respective successors, including any trustees thereof, creditors, employees, unions, former employees and shareholders, administrative agencies, governmental units, secretaries of state, federal, state and local officials, maintaining any authority relating to any environmental, health and safety laws, and their respective successors or assigns) shall be, and hereby are, forever barred, estopped, and permanently enjoined from asserting, prosecuting, or otherwise pursuing such Claims or Interests of any kind or nature whatsoever against any Buyer, its property, successors and assigns, or the Transferred Assets, as an alleged successor or otherwise, with respect to any Claim or Interest of any kind or nature whatsoever such Person had, has or may have against or in the Debtors, the Debtors' estates, their respective officers, directors, shareholders, or the Transferred Assets. Following the Closing, no holder of any Claim or Interest in the

Debtors shall interfere with any Buyer's title to or use and enjoyment of the Transferred Assets based on or related to such Claim or Interest, or any actions that the Debtors may take in their chapter 11 cases.

33. This Court retains jurisdiction to enforce and implement the terms and provisions of this Order, each of the Purchase Agreements, any waivers and consents thereunder, and of each of the agreements and documents executed pursuant to or in connection therewith in all respects, including, but not limited to, retaining jurisdiction to (a) compel delivery of the TWNY Transferred Assets to TWNY and the Comcast Transferred Assets to Comcast, (b) compel delivery of the purchase price or performance of other obligations owed by or to the Debtors, (c) resolve any disputes arising under or related to either Purchase Agreement, except as otherwise provided therein, or any of the agreements and documents executed pursuant thereto or in connection therewith, (d) interpret, implement, and enforce the provisions of this Order, and (e) protect each Buyer against (i) any of the Excluded Liabilities or (ii) the assertion of any Claims and Interests against the Transferred Assets (other than Assumed Sale Liabilities, as applicable), of any kind or nature whatsoever; provided, however, with respect to a governmental unit's exercise of its police or regulatory powers other than the enforcement of a money judgment, the jurisdiction of any other tribunal shall not be reduced or impaired from that as set forth in any applicable, valid statutory grant of jurisdiction.

34. The transactions contemplated by the Purchase Agreements are undertaken by each Buyer without collusion and in good faith, as that term is used in section 363(m) of the Bankruptcy Code, and accordingly, the reversal or modification on appeal of the authorization

provided herein to consummate the 363 Sale shall not affect the validity of the 363 Sale (including, without limitation, the assumption and assignment of any of the Assigned Contracts), unless such authorization is duly stayed pending such appeal. Each Buyer is a purchaser in good faith of the applicable Transferred Assets to be purchased by it, and is entitled to all of the protections afforded by section 363(m) of the Bankruptcy Code.

35. The terms and provisions of each of the Purchase Agreements and all related ancillary documents shall be binding on the parties thereto, and the provisions of this Order shall be binding in all respects upon, and shall inure to the benefit of, the Debtor Parties, their estates, and their creditors, the applicable Buyer and its respective affiliates, successors, and assigns, and any affected third parties including, but not limited to, all Persons asserting a Claim or Interest in the Transferred Assets, notwithstanding any subsequent appointment of any trustee(s) under any chapter of the Bankruptcy Code, as to which trustee(s) such terms and provisions likewise shall be binding. Nothing in this Order shall relieve a Buyer or any Debtor from any Liability it may have to the other under any express, unambiguous writing by either party in connection with such Buyer's Purchase Agreement or the transactions contemplated thereby.

36. In the event of a conflict between this Order or any Purchase Agreement, on the one hand, and the terms of any plan of reorganization confirmed in the Debtors' chapter 11 cases or any order confirming such plan, on the other hand, this Order or such Purchase Agreement, as applicable, shall control.

37. The failure specifically to include any particular provisions of any of the Purchase Agreements in this Order shall not diminish or impair the effectiveness of

such provision, it being the intent of the Court that each of the Purchase Agreements be authorized and approved in its entirety.

38. Each of the Debtor Parties is authorized to execute the Purchase Agreements or other related documents and agreements contemplated thereby or entered into in connection therewith and to consummate all transactions, and take any other actions, contemplated by, or necessary or appropriate to effectuate, the Purchase Agreements.

39. Each and every Debtor shall be jointly and severally liable for any breach or violation of Seller's representations, warranties or covenants under each Purchase Agreement (except to the extent any Liability is limited to the Escrow Account entered into pursuant to each of the Purchase Agreements as a result of the limitations set forth in Article VII of the applicable Purchase Agreement), and shall execute and deliver such Contracts and take such further action as may be reasonably requested by either Buyer to evidence the intent and effect of the foregoing. To the extent any obligations of any of the Debtors under any Purchase Agreement are transferred or assigned to, or assumed by, any successor to (or assignee of) the Debtors, including the Debtors as reorganized, (i) such obligations shall be fully enforceable against such successor or assignee and (ii) to the extent provided in such Purchase Agreement, such obligations shall remain fully enforceable against the Debtors, or the Debtors as reorganized, as the case may be, on a joint and several basis.

40. Either of the Purchase Agreements and any related agreements, documents or other instruments may be modified, amended or supplemented by the parties thereto and in accordance with the terms hereof, without

further order of the Court, provided that any such modification, amendment, or supplement does not have a material adverse effect on the Debtors' estates.

41. The transfer of the Transferred Assets and the 363 Sale is necessary to consummation of the JV Plan and a chapter 11 plan or plans (including the Proposed Plan) for the Debtors. All conditions precedent to the consummation of the JV Plan must be satisfied substantially contemporaneously with the Closing and consummation of each of the Purchase Agreements is a condition that must be satisfied substantially contemporaneously with the consummation of the JV Plan. Accordingly, the Transferred Assets shall be transferred pursuant to section 1146(c) of the Bankruptcy Code, and shall not be taxed under any law imposing a stamp tax or a sale, transfer, or any other similar tax; *provided, however*, that notwithstanding anything herein to the contrary, the issue of whether California and Washington state sales taxes are "stamp or similar taxes" subject to exemption under section 1146(c) of the Bankruptcy Code shall be the subject of further decision by this Court. Each and every federal, state and local government agency or department is hereby directed to accept, file and/or record any and all documents and instruments necessary or appropriate to consummate the transfer of any of the Transferred Assets, all without imposition or payment of any stamp tax, transfer tax, or similar tax.

42. The provisions of this Order are non-severable and mutually dependent and, pursuant to Bankruptcy Rules 6004(g) and 6006(d), this Order shall not be stayed for 10 days and shall be effective immediately upon entry.

Dated: June 28, 2006

/s/ ROBERT E. GERBER
HONORABLE ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE

Exhibit A

363 Sale Objections
(Objections to Additional Buyer Provisions)

Objecting Party	Date	Docket Number
PHH Vehicle Management Services, LLC	06/05/06	11082
Ad Hoc Committee of Arahova Noteholders	06/05/06	11083
Calyon New York Branch, Calyon Securities (USA) Inc.	06/05/06	11084
Official Committee Of Unsecured Creditors	06/05/06	11087
Counties of Nash and Pitt and the Towns of Bailey, Castalia, Dortches, Middlesex, Momeyer, Red Oak, Spring Hope, and Whitakers, North Carolina	06/05/06	11088
W.R. Huff Asset Management Co., LLC	06/05/06	11089
Ad Hoc Adelphia Trade Claims Committee	06/05/06	11090

Objecting Party	Date	Docket Number
JPMorgan Chase Bank	06/05/06	11091
Official Committee of Equity Security Holders	06/05/06	11092
Ad Hoc Committee of FrontierVision Noteholders	06/06/06	11097
Official Committee Of Unsecured Creditors (Supplemental Objection)	06/14/06	11225

363 Sale Objections (Objections to Sale)

Objecting Party	Date	Docket Number
Washington State Department of Revenue	06/07/06	11123
City of Auburn, New York Limited	06/19/06	11330
Palm Beach County Tax Collector	06/20/06	11342
Ad Hoc Committee of Olympus Parent Noteholders'	06/20/06	11344

Objecting Party	Date	Docket Number
Ad Hoc Adelphia Trade Claims Committee	06/20/06	11346
Lucent Technologies, Inc.	06/20/06	11348
Ad Hoc Committee of Arahova Noteholders	06/20/06	11353
Century-TCI Administrative Agent	06/20/06	11356
City of Martinsville, Virginia and Martinsville Cable, Inc.	06/20/06	11358
Olympus Administrative Agent	06/20/06	11364
Official Committee of Equity Security Holders	06/20/06	11365
JPMorgan Chase Bank N.A.	06/20/06	11367
Official Committee of Unsecured Creditors	06/20/06	11372
Calyon New York Branch	06/23/06	11420

Exhibit B

Outstanding Non-LFA Contract Objections

Objecting Party	Date	Docket Number
PHEH Vehicles Management Services	2/17/06	9734
Niagara Mohawk Power Corporation, Granite State Electric Company, and Massachusetts Electric Company	2/21/06	9753
FirstEnergy	2/21/06	9754
Meredith Enterprises, Inc.	2/20/06, 6/21/06	9758, 11385
Southern California Edison Company	2/21/06	9760
American Electric Power Docket	2/21/06	9769
Duke Energy Corporation d/b/a Duke Power Company	2/21/06	9774
Greenwood Village Community Association, Inc.	2/21/06	9781
Cincinnati Gas and Electric Company, d/b/a Cinergy	2/21/06	9786
MHC Golden Lakes, LLC, MHC Financing Limited Partnership, and MHC Financing Limited Partnership Two	2/21/06	9787

Objecting Party	Date	Docket Number
Alabama Power Company	2/22/06	9794
Rappahannock Electric Cooperative	2/16/06	9795
Harris Corporation	2/20/06	9796
Thrifty Payless Corporation	2/22/06	9813
Paradise Gardens, L.P.	3/1/06	9939
SBC Communications, Inc.	3/2/06	9953
Georgia Power Company	3/22/06	10189
Fountain View Apartments	4/24/06	10556
New York State Electric and Gas Corporation	6/1/06	11063
Harborside Commons Apartments, L.L.C.	6/1/06	11071
Carolina Power and Light	6/2/06	11081
Woodfield Country Club Homeowners' Association, Inc.	6/13/06	11206

Outstanding LFA Objections

Objecting Party	Date	Docket Number
The Unofficial Committee of Certain Municipalities in Maine and New Hampshire[1]	1/13/2006	9292
Charlotte-Mecklenburg Office of Cable and Franchise Management[2]	1/13/2006	9309
City Of Auburn, New York	1/13/2006	9316
City of Richmond Heights, Ohio	1/14/2006	9333
City of El Centro, California	1/14/2006	9346
City of Martinsville, Virginia and Henry County, Virginia	1/17/2006	9360
Town of Momeyer, North Carolina[3]	1/17/2006	9384

[1] A complete list of the local franchising authorities represented by the Unofficial Committee of Certain Municipalities in Maine and New Hampshire is appended to such committee's objection.

[2] The Charlotte-Mecklenburg of Cable and Franchise Management filed an objection to Cure Notices served by the Debtors to the following local franchising authorities: Mecklenburg County; the Town of Mooresville; the Town of Huntersville; the Town of Davidson; the Town of Cornelius; and the Town of Troutman.

[3] This objection relates to a franchise for which no separate agreement exists. Accordingly, Adelphia has not moved for the assumption and assignment of this franchise.

Objecting Party	Date	Docket Number
Town of Castalia, North Carolina	1/17/2006	9386
Town of Whitakers, North Carolina	1/17/2006	9388
Town of Red Oak, North Carolina	1/17/2006	9389
County of Nash, North Carolina	1/17/2006	9393
Town of Bailey, North Carolina	1/17/2006	9395
Town of Middlesex, North Carolina	1/17/2006	9419
City of Villa Park, California	1/17/2006	9435
City of Chino, California	1/17/2006	9436
City of Fullerton, California	1/17/2006	9439
City of Newport Beach, California	1/17/2006	9440
City of Twentynine Palms, California	1/17/2006	9442
City of Baldwin Park, California	1/17/2006	9445
Town of Spring Hope, North Carolina	1/17/2006	9571
County of San Diego, California	2/21/2006	9775

Objecting Party	Date	Docket Number
County of Pitt, North Carolina	4/16/2006	10455
Town of Dortches, North Carolina	4/16/2006	10456
City of Lynchburg, VA	4/28/2006	10721
City of Diamond Bar, California	5/4/2006	10724

EXHIBIT 2

[LOGO OF ADELPHIA]

For Immediate Release Contacts:
(Media) Paul Jacobson (303) 268-6426
(Investor Relations) Mark Spiecker (303) 268-6545

Adelphia Closes Asset Sale to Time Warner Cable and Comcast

Greenwood Village, Colo., *July 31, 2006*—Adelphia Communications Corporation (OTC: ADELQ) today completed the sale of substantially all of its assets to Time Warner Cable and Comcast Corporation for aggregate consideration of approximately $12.5 billion in cash and approximately 16 percent of the equity of Time Warner's cable subsidiary.

As a result of the sale, Adelphia will no longer operate as a U.S. cable company. Its approximately 4.8 million customers will be distributed between Time Warner Cable and Comcast.

Teams from the buyers and Adelphia have worked together for months to ensure an orderly transition for customers, communities and the almost 13,000 Adelphia employees who will transfer to Time Warner Cable and Comcast.

"The successful closing of this sale signals a major achievement for Adelphia's Chapter 11 bankruptcy case on several fronts," said Chairman and CEO William Schleyer. "We've maximized the recovery for our creditors, dramatically improved the quality and performance of the systems going to Time Warner Cable and Comcast and saved almost 13,000 jobs. That stands in stark con-

trast to the situation almost 40 months ago when there was serious talk of liquidating Adelphia."

Concurrent with the closing of the sale, Adelphia also consummated a plan of reorganization for the former joint ventures with Comcast (Century-TCI and Parnassos), resulting in the repayment in full of approximately $1.7 billion of indebtedness. Adelphia Communications Corporation will hold the remaining sale proceeds for distribution to its creditors through a plan of reorganization as it seeks to resolve its Chapter 11 bankruptcy case in the U.S. Bankruptcy Court for the Southern District of New York (case number 02-41729).

On July 24, 2006 Adelphia announced an agreement on a framework for a Plan of Reorganization intended to result in a fourth quarter 2006 emergence from Chapter 11. The agreement enjoys widespread support among Adelphia's major unsecured creditors, including the Official Committee of Unsecured Creditors, though several constituencies do not support it. Adelphia's obligations under the agreement and the reorganization plan envisioned by it are subject to approval by the Bankruptcy Court.

"While our focus now turns to achieving a confirmed Plan of Reorganization as soon as possible," added Schleyer, "we should take this opportunity to thank Adelphia's employees who had the faith to endure through four years of uncertainty and whose hard work significantly increased values to our creditors and delivered much-improved cable systems to our buyers."

UBS Investment Bank and Allen & Company LLC served as Adelphia's financial advisors for the sale transaction. Sullivan & Cromwell LLP served as Adelphia's legal advisor for the sale. Willkie Farr & Gallagher LLP continues to serve as Adelphia's legal counsel for the Chapter 11 bankruptcy process.

About Adelphia

Adelphia Communications Corporation is the fifth largest cable television company in the country. It serves customers in 31 states and offers analog and digital video services, high-speed Internet access and other advanced services over Adelphia's broadband networks.

Cautionary Statement Regarding Forward-Looking Statements

This report includes forward-looking statements. All statements regarding the Company's and its subsidiaries' and affiliates' expected future financial position, results of operations, cash flows, sale of the Company, settlements with the Securities and Exchange Commission (the "SEC") and the United States Attorney's Office for the Southern District of New York (the "U.S. Attorney") and expected emergence from bankruptcy, as well as statements that include words such as "anticipate," "if," "believe," "plan," "estimate," "expect," "intend," "may," "could," "should," "will" and other similar expressions are forward-looking statements. Such forward-looking statements are inherently uncertain, and readers must recognize that actual results may differ materially from the Company's expectations. The Company does not undertake a duty to update such forward-looking statements. Factors that may cause actual results to differ materially from those in the forward-looking statements include the potential costs and impacts of the transactions and obligations associated with the sale of substantially all of the consolidated assets of the Company to Time Warner NY Cable LLC and Comcast, whether and on what timetable a joint plan of reorganization under Chapter 11 of the Bankruptcy Code will be confirmed and consummated, whether the transactions con-

templated by the settlements with the SEC and the U.S. Attorney and any other agreements needed to effect those transactions are consummated, the Company's pending bankruptcy proceeding, results of litigation against the Company, results and impacts of the sale of the Company's assets and those discussed under Items 1A, "Risk Factors," in the Company's Annual Report on Form 10-K for the fiscal year ended December 31, 2005 and Quarterly Report on Form 10-Q for the period ended March 31, 2006 and in the Company's Fourth Amended Disclosure Statement, filed with the Bankruptcy Court on April 28, 2006, which is available in the investor relations section of the Company's website at *www.adelphia.com*. Information contained on the Company's Internet website is not incorporated by reference into this report. Many of these factors are outside of the Company's control.

###

EXHIBIT 3

Exhibit 99.1

[LOGO OF ADELPHIA]

For Immediate Release Contacts:
(Media) Paul Jacobson (303) 268-6426
(Investor Relations) Mark Spiecker (303) 268-6545

Adelphia Signs Plan Agreement With Creditors Committee and Other Unsecured Creditors

Major Bankruptcy Milestone; Subject To Court Approval; Ch. 11 Emergence Intended In Fourth Quarter 2006

Anticipated July 31 Closing Date for Sale of Adelphia Assets Not Affected

Greenwood Village, Colo., ***July 24, 2006***—In a major step forward in its four-year bankruptcy case, Adelphia Communications Corporation (OTC:ADELQ) and Committees representing most of the Company's major bondholders and trade creditors, including the Official Committee of Unsecured Creditors, as well as significant individual creditors have agreed upon the framework for a plan of reorganization intended to result in a fourth quarter 2006 emergence from Chapter 11 bankruptcy. The agreement, reached on Friday, July 21, enjoys widespread support among Adelphia's major unsecured creditors, but several major constituencies including the pre-petition bank lenders and certain bondholders have not signed the agreement. The Company's obligations under the agreement and the reorganization plan envisioned by the agreement are subject to approval by the

U.S. Bankruptcy Court for the Southern District of New York.

"This agreement will help pave the way toward a new, modified Plan of Reorganization that will be subject to court approval, and we're pleased that after lengthy negotiations a significant majority of our unsecured creditors are satisfied with the outcome and supportive of this settlement," said Bill Schleyer, chairman and CEO of Adelphia. "In addition, we're thankful for the role Court-appointed Monitor Judge Cecilia Morris played in bringing these parties together," added Schleyer. "Our intention now is to seek a resolution of outstanding differences with the holders of bank and other claims and emerge from bankruptcy sometime in the fourth quarter of 2006."

The agreement reflects a compromise among several important creditor groups under which approximately $1.08 billion in value will be transferred from certain unsecured creditors of various Adelphia subsidiaries to certain unsecured senior and trade creditors of the Adelphia Communications parent corporation, subject, in some cases, to reimbursement from contingent sources of value, including the proceeds of a litigation trust to be established under the plan to pursue claims against third-parties that are alleged to have damaged Adelphia. The plan outlined in the agreement is conditioned on, among other things, the closing of the anticipated sale of substantially all of the Company's assets to Time Warner and Comcast. Adelphia intends to soon file a revised Plan of Reorganization and accompanying Disclosure Statement with the bankruptcy court embodying the terms of the agreement.

The expected July 31, 2006 closing date for the sale of Adelphia's assets and joint venture interests to Time Warner Cable and Comcast remains in effect.

A copy of the Agreement is being filed today with the Securities and Exchange Commission (SEC) as an exhibit to a Form 8-K.

Until now, disputes among creditors over how to distribute proceeds from the sale to Time Warner Cable and Comcast have delayed resolution of the Adelphia Bankruptcy case, which was filed in June 2002 and is one of the largest and most complex in U.S. history.

About Adelphia

Adelphia Communications Corporation is the fifth largest cable television company in the country. It serves customers in 31 states and offers analog and digital video services, high-speed Internet access and other advanced services over Adelphia's broadband networks.

Cautionary Statement Regarding Forward-Looking Statements

This press release includes forward-looking statements. All statements regarding the Company's and its subsidiaries' and affiliates' expected future financial position, results of operations, cash flows, sale of the Company, settlements with the Securities and Exchange Commission (the "SEC") and the United States Attorney's Office for the Southern District of New York (the "U.S. Attorney"), restructuring and financing plans, expected emergence from bankruptcy, business strategy, budgets, projected costs, capital expenditures, network upgrades, products and services, competitive positions, growth opportunities, plans and objectives of management for future operations, as well as statements that include words such as "anticipate," "if," "believe," "plan," "estimate," "expect," "intend," "may," "could," "should," "will" and other similar expressions are for-

ward-looking statements. Such forward-looking statements are inherently uncertain, and readers must recognize that actual results may differ materially from the Company's expectations. The Company does not undertake a duty to update such forward-looking statements. Factors that may cause actual results to differ materially from those in the forward-looking statements include whether the proposed sale of the Company's assets to Time Warner NY Cable LLC ("TW NY") and Comcast Corporation ("Comcast") is consummated, whether the Third Modified Fourth Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code for Century-TCI Debtors and Parnassos Debtors, as Confirmed, Dated as of June 28, 2006, will be consummated in time to close the sale of assets to TW NY and Comcast, the potential costs and impacts of the transactions and obligations associated with the sale of substantially all of the consolidated assets of the Company to TW NY and Comcast, whether the transactions contemplated by the settlements with the SEC and the U.S. Attorney and any other agreements needed to effect those transactions are consummated, the Company's pending bankruptcy proceeding, results of litigation against the Company, results and impacts of the proposed sale of the Company's assets, the effects of government regulation including the actions of local cable franchising authorities, the availability of financing, actions of the Company's competitors, pricing and availability of programming, equipment, supplies and other inputs, the Company's ability to upgrade its broadband network, technological developments, changes in general economic conditions, and those discussed under Items 1A, "Risk Factors," in the Company's Annual Report on Form 10-K for the fiscal year ended December 31, 2005 and Quarterly Report on Form 10-Q for the period ended

March 31, 2006 and in the Company's Fourth Amended Disclosure Statement, filed with the Bankruptcy Court on April 28, 2006, which is available in the investor relations section of the Company's website at *www.adelphia.com*. Information contained on the Company's Internet website is not incorporated by reference into this press release. Many of these factors are outside of the Company's control.

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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 8-K

CURRENT REPORT

Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

Date of Report (Date of earliest event reported):
July 21, 2006

ADELPHIA COMMUNICATIONS CORPORATION
(Exact name of registrant as specified in its charter)

Delaware	**0-16014**	**23-2417713**
(State or other jurisdiction of incorporation)	(Commission File Number)	(IRS Employer Identification No.)

5619 DTC Parkway— Greenwood Village, CO (Address of principal executive offices)	**80111** (Zip Code)

(303) 268-6300
(Registrant's telephone number, including area code)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions (see General Instruction A.2 below):

❑ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

- ❑ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
- ❑ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
- ❑ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Item 1.01. Entry into a Definitive Material Agreement.

Effective July 21, 2006, Adelphia Communications Corporation ("Adelphia" or the "Company") entered into a Second Amended and Restated Agreement Concerning Terms and Conditions of a Modified Chapter 11 Plan (the "Plan Agreement") with certain representatives of the *ad hoc* committee of holders of ACC Senior Notes represented by Hennigan, Bennett & Dorman LLP, the *ad hoc* committee of holders of ACC Senior Notes and Arahova Notes represented by Pachulski Stang Ziehl Young Jones & Weintraub LLP, the *Ad hoc* Committee of Arahova Noteholders, the *Ad hoc* Committee of holders of FrontierVision Opco Notes Claims and FrontierVision Holdco Notes Claims, W.R. Huff Asset Management Co., L.L.C., the *ad hoc* committee of ACC Trade Claimants, the *ad hoc* committee of Subsidiary Trade Claimants, and representatives of the Official Committee of Unsecured Creditors (the "Creditors' Committee").

The Plan Agreement is designed to form the basis of an amended plan of reorganization for the Company and its subsidiaries (the "Modified Plan"), which includes a proposed global compromise and settlement of all disputes among the creditors, not all of whom are parties to the Plan Agreement. The Company's obligations under the Plan Agreement are subject to the entry by the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") of an order approving a disclosure statement with respect to the Modified Plan and authorizing the Company to propose the Modified Plan as provided in the Plan Agreement. The Plan Agreement does not apply to the Parnassos and Century-TCI joint venture debtors, which are to be reor-

ganized under a separate plan of reorganization confirmed by the Bankruptcy Court on June 28, 2006.

The Plan Agreement contemplates that the Company and the Creditors' Committee, as co-proponents would file the Modified Plan under which all unsecured creditors of the Company's subsidiaries would receive payment in full of all principal and accrued interest (at various rates specified in the Plan Agreement) through the Modified Plan's effective date (the "Effective Date"), subject to specified "give-ups" in varying amounts of Plan Consideration which would in the aggregate amount to $1.08 billion, and would be transferred to the creditors of the Company itself. The "give-ups" are as follows: (i) $750 million from amounts otherwise allocable to the Arahova notes, (ii) $85 million from amounts otherwise allocable to the FrontierVision operating company and holding company notes; (iii) $30 million from amounts otherwise allocable to the Olympus bonds and the FPL note (the holders of which are not party to the Plan Agreement); (iv) $39.2 million from amounts otherwise allocable to subsidiary trade claims; and (v) $6.8 million from amounts otherwise allocable to other subsidiary unsecured creditors. Subsidiary creditors would have the ability to be repaid these "give-ups" (plus interest at specified rates) from proceeds, if any, of specified contingent sources of consideration on the terms set forth in the Plan Agreement, including in the case of the "give-ups" by the creditors of Arahova and Frontiervision, designated litigation of the Company and its subsidiaries held by a Contingent Value Vehicle (the "CVV") and, in certain cases, releases from specified reserves. In addition, $175 million that was otherwise designated to fund an indemnification reserve in favor of the Bank Lenders would also be transferred to the cred-

itors of the Company (as described below, the Bank Lenders are not party to the Plan Agreement).

The Plan Agreement contemplates that the creditors of the Company itself would receive: (1) the $1.08 billion of give-ups described above, (2) the residual sale consideration after funding all other distributions and reserves, and (3) interests in the CVV as described in the Plan Agreement.

The Plan Agreement contemplates that the Creditors' Committee will be the sole proponent of the Modified Plan with respect to the treatment of claims of the prepetition lenders (the "Banks"). Under the Plan Agreement, all Bank claims (both Agent and Non-Agent) would be disputed claims under the Modified Plan, and would be subject to disallowance in whole or in part. Unless and until otherwise allowed, the Plan Agreement proposes that no Bank would receive any distributions under the Modified Plan, and the liens and/or security interests securing such claims would be transferred to and attach to the proceeds of the Company's sale transactions with Comcast Corporation ("Comcast") and Time Warner NY Cable LLC ("TW NY"), in an amount sufficient to pay in full the maximum amount of the disputed Bank claims as determined by the Bankruptcy Court. Pending resolution of the disputed Bank claims, the Plan Agreement contemplates that the sale transaction proceeds subject to such liens will be retained by the Debtors. Notwithstanding the foregoing, the Plan Agreement proposes that under the Modified Plan each Bank would have the right to elect to receive payment in full in cash on the Effective Date of all outstanding principal and all accrued interest at the non-default interest rate in effect at the commencement date of the Chapter 11 cases of the Company and its subsidiaries, subject to disgorgement upon the entry of a final order directing

the return of some or all of such distribution. The Plan Agreement contemplates that the Modified Plan will provide that any Bank making such an election will be deemed to have waived any objection to confirmation of the Modified Plan and any claim or entitlement to additional interest, post-Effective Date fees and expenses, and/or indemnification, and will be deemed to have agreed to comply with any disgorgement order directed to it. Pending allowance of the Bank claims, the Plan Agreement contemplates that the Debtors (subject to any limitations imposed by order of the Bankruptcy Court) and/or the Creditors' Committee (and their applicable successors under the Modified Plan) would pursue objections to all such claims under all applicable provisions of the Bankruptcy Code, including among others, all applicable provisions of section 502, including subsection (d). The Banks are not party to the Plan Agreement; however, the Plan Agreement contains an acknowledgement that the parties will continue their good faith negotiations with the Banks regarding the Banks' plan treatment.

The Plan Agreement contemplates the creation of a true-up reserve (the "True-Up Reserve") of Class A Common Stock of Time Warner Cable Inc. (the "TWC Class A Common Stock") (or cash to the extent there is not sufficient stock available) by withholding amounts otherwise payable in respect of initial Effective Date distributions pending a market valuation of such stock (the "Market Value"). Subject to certain limitations, the True-Up Reserve is intended to be sufficient to permit the upward or downward adjustment of the total number of shares received by creditors of subsidiaries of Adelphia based upon a Market Value of the TWC Class A Common Stock that is up to fifteen percent higher or lower than the deemed value used for initial distributions.

The Plan Agreement is conditioned upon the Effective Date of the Modified Plan occurring no later than the later of September 15, 2006 and 15 days after the closing of the TWC Sale, but in no event later than October 31, 2006. Conditions to the Effective Date of the Modified Plan would also include material completion of the distribution of TWC Class A Common Stock to creditors prior to October 31, 2006, and the distribution to Adelphia's creditors on the Effective Date or immediately thereafter of Plan Consideration of at least $1.080 billion (before deducting the True-Up Reserve).

To assist in transition related matters, the Plan Agreement contemplates the appointment of a committee designee, who would work with representatives of the Company prior to and after consummation of the sale transactions.

The foregoing description of the terms of the Plan Agreement does not purport to be complete and is qualified in its entirety by reference to the Plan Agreement, a copy of which is filed herewith as Exhibit 10.1.

This filing is not intended to be, nor should it be construed as, a solicitation for a vote on a plan of reorganization.

Item 9.01 Financial Statements and Exhibits.

Exhibit 10.1	Second Amended and Restated Agreement Concerning Terms and Conditions of a Modified Chapter 11 Plan, dated as of July 21, 2006
Exhibit 99.1	Press Release of the Company, dated July 24, 2006

Cautionary Statement Regarding Forward-Looking Statements

This report includes forward-looking statements. All statements regarding the Company's and its subsidiaries' and affiliates' expected future financial position, results of operations, cash flows, sale of the Company, settlements with the SEC and the United States Attorney's Office for the Southern District of New York (the "U.S. Attorney"), restructuring and financing plans, expected emergence from bankruptcy, business strategy, budgets, projected costs, capital expenditures, network upgrades, products and services, competitive positions, growth opportunities, plans and objectives of management for future operations, as well as statements that include words such as "anticipate," "if," "believe," "plan," "estimate," "expect," "intend," "may," "could," "should," "will" and other similar expressions are forward-looking statements. Such forward-looking statements are inherently uncertain, and readers must recognize that actual results may differ materially from the Company's expectations. The Company does not undertake a duty to update such forward-looking statements. Factors that may cause actual results to differ materially from those in the forward-looking statements include whether the proposed sale of the Company's assets to TW NY and Comcast is consummated, whether the Third Modified Fourth Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, as Confirmed, Dated as of June 28, 2006, relating to the Parnassos Communications, L.P. and Century-TCI California Communications, L.P. joint ventures the debtors hold with Comcast, will be consummated in time to close the sale of assets to TW NY and Comcast, the potential costs and impacts of the transactions and obligations associated with the sale of assets to TW NY and Comcast, whether

the transactions contemplated by the settlements with the SEC and the U.S. Attorney and any other agreements needed to effect those transactions are consummated, the Company's pending bankruptcy proceeding, results of litigation against the Company, results and impacts of the proposed sale of the Company's assets, the effects of government regulation including the actions of local cable franchising authorities, the availability of financing, actions of the Company's competitors, pricing and availability of programming, equipment, supplies and other inputs, the Company's ability to upgrade its broadband network, technological developments, changes in general economic conditions, and those discussed under Items 1A, "Risk Factors," in the Company's Annual Report on Form 10-K for the fiscal year ended December 31, 2005 and Quarterly Report on Form 10-Q for the period ended March 31, 2006 and in the debtors' supplement to the Fourth Amended Disclosure Statement, filed with the Bankruptcy Court on April 28, 2006, which is available in the investor relations section of the Company's website at *www.adelphia.com*. Information contained on the Company's Internet website is not incorporated by reference into this report. Many of these factors are outside of the Company's control.

SIGNATURE

Pursuant to the requirements of the Securities Exchange Act of 1934, as amended, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

Date: July 24, 2006

ADELPHIA COMMUNICATIONS CORPORATION
(Registrant)

By:/s/ BRAD M. SONNENBERG
Name: Brad M. Sonnenberg
Title: Executive Vice President, General Counsel and Secretary

EXHIBIT INDEX

Exhibit No.	Description
Exhibit 10.1	Second Amended and Restated Agreement Concerning Terms and Conditions of a Modified Chapter 11 Plan, dated as of July 21, 2006.
Exhibit 99.1	Press Release of the Company, dated July 24, 2006

Exhibit 10.1

EXECUTION COPY

In re Adelphia Communications Corp., et al.

Second Amended and Restated Agreement Concerning Terms and Conditions of a Modified Chapter 11 Plan

This Second Amended and Restated Agreement dated as of July 21, 2006 (the "Execution Date"), is entered into by and among the undersigned Parties (as defined below) in the chapter 11 cases of In re Adelphia Communications Corp., et al., Chapter 11 Case No. 02-41729 (REG).

WHEREAS, representatives of the *ad hoc* committee of holders of ACC Senior Notes represented by Hennigan, Bennett & Dorman LLP (subject to the limitation in the Fourth Whereas clause, the "ACC Committee"), the *ad hoc* committee of holders of ACC Senior Notes and Arahova Notes represented by Pachulski Stang Ziehl Young Jones & Weintraub LLP (the "Committee II"), the *Ad hoc* Committee of Arahova Noteholders (the "Arahova Committee"), the *Ad Hoc* Committee (the "FrontierVision Committee") of holders of FrontierVision Opco Notes Claims and FrontierVision Holdco Notes Claims (together, the "FrontierVision Notes Claims"), and W.R. Huff Asset Management Co., L.L.C. ("Huff') (collectively, the "Creditor Parties"), and representatives of the Debtors, the Official Committee of Unsecured Creditors (the "Creditors' Committee") and a monitor (the "Monitor") appointed by the Bankruptcy Court, attended meetings in Poughkeepsie, New York and New York, New York and participated in several telephone confer-

ence calls in an effort to reach a global compromise and settlement of all disputes among the parties.

WHEREAS, on June 21, 2006, the Committee II, the Arahova Committee, Huff and the FrontierVision Committee executed that certain Agreement Concerning Terms and Conditions of a Modified Plan (the "Original Term Sheet").

WHEREAS, after June 21, 2006, representatives of the *ad hoc* committee of Olympus Noteholders, the *ad hoc* committee of FPL Noteholders, the *ad hoc* committee of ACC Trade Claimants (the "ACC Trade Committee") and the *ad hoc* committee of Subsidiary Trade Claimants (the "Subsidiary Trade Committee", and together with the Creditors' Committee, the ACC Committee (subject to the limitation in the next recital) and the other Creditor Parties, the "New Creditor Parties") participated in telephone conferences and meetings with the Creditor Parties and the Monitor in an effort to reach further consensus and compromise regarding the terms of the Original Term Sheet.[1]

WHEREAS, on June 30, 2006, certain representatives of the ACC Committee agreed to an Amended and Restated Agreement and agreed to recommend and support the adoption of the terms set forth herein as part of a revised chapter 11 plan. References in this term sheet to the "ACC Committee" are to those members of the ACC Committee who have agreed or subsequently agree to this term sheet.

[1] For the avoidance of doubt, parties who may fall under the defined terms Creditor Parties, New Creditor Parties and/or Parties, shall only be entitled to the benefits of this Agreement if they have executed this Agreement.

WHEREAS, on June 30, 2006 counsel to the Subsidiary Trade Committee agreed to seek the approval of the Subsidiary Trade Committee and to recommend that the Subsidiary Trade Committee support the adoption of the terms set forth in the Amended and Restated Agreement as part of a revised chapter 11 plan.

WHEREAS, by the Agreement, dated as of July 5, 2006, the New Creditor Parties agreed to the terms of the Amended and Restated Agreement that superseded in all respects the terms of the Original Term Sheet.

WHEREAS, the New Creditor Parties continued discussions with the Debtors regarding the terms of a Chapter 11 Plan of Reorganization.

WHEREAS, on the Execution Date, the New Creditor Parties agreed that the terms of this Second Amended and Restated Agreement (the "Agreement") shall supersede in all respects the Amended and Restated Agreement and that other creditors of the Debtors may become a party to this Agreement by execution of a joinder agreement (such other creditors, the New Creditor Parties and the Debtors being the "Parties").

WHEREAS, the Debtors filed and proposed a Modified Fourth Amended Joint Plan of Reorganization dated April 28, 2006 (the "Plan"),[2] which generally provided for two mutually-exclusive options—a "holdback plan" option that provided for continued litigation of the Inter-Creditor Dispute following the Effective Date (the "Hold Back Plan"), and a "settlement plan" option that provided for resolution of the Inter-Creditor Dispute

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[2] While certain of the New Creditor Parties view the Plan as null and void and of no force and effect, necessarily and for ease of reference only, capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Plan.

through several Potential Settlements (the "Settlement Plan").

WHEREAS, on June 27 and 28, 2006, pursuant to section 363 of the Bankruptcy Code and under a modified plan for only certain of the debtors (the "Debtors' JV Plans"), the Bankruptcy Court approved the sale of substantially all of the Debtors assets to Time Warner Cable and Comcast pursuant to the Purchase Agreements, as amended, the Registration Rights Agreement and the Comcast side letter executed by the Debtors (the "363 Documents").

WHEREAS, confirmation of a "global plan" for the remaining chapter 11 debtors not subject to the Debtors' JV Plan (the "Debtors") as soon as practicable will materially reduce the burdens on the estates resulting under the 363 Documents and from continued operation under chapter 11 protection.

WHEREAS, the New Creditor Parties desire to overtake, resolve, compromise and settle the Motion In Aid process and all issues related thereto.

WHEREAS, the Parties desire to overtake, amend and modify the Plan, eliminate the legal infirmities and impediments, if any, related to the TWC Sale and the 363 Documents and reduce the costs associated with the estates' continued operation under chapter 11 protection, consistent with the terms of this Agreement.

WHEREAS, the Parties have agreed, subject to the terms and conditions set forth herein, that the Plan and Disclosure Statement will be modified, amended and redocumented so that the Plan will incorporate a global compromise and settlement pursuant to Bankruptcy Rule 9019 (the "Settlement") pursuant to which, among other things, in addition to the $635 million of value desig-

nated for transfer to creditors of ACC in the Debtors' Settlement Plan (the "Initial ACC Settlement Consideration"), creditors of ACC will also receive on the Effective Date (a) an added $270 million from third party give ups (the "Third Party Give Ups"); (b) an added $125 million advance (the "Incremental Arahova Advance") from Arahova; (c) a give up of $50 million from Arahova (the "Arahova Give Up"); and (d) potential additional value from "Identified Sources", for a total amount of not less than $445 million in additional settlement consideration (collectively, (a), (b), (c), and (d) are the "Incremental ACC Settlement Consideration"), meaning that an aggregate of settlement consideration of not less than $1.080 billion of Plan distributions (the "ACC Effective Date Settlement Distribution"), exclusive of CVV Interests, will be made available for distribution to holders of the ACC Senior Notes Claims and the ACC Trade Claims[3] on the Effective Date.

WHEREAS, the New Creditor Parties have agreed that, subject to the terms and conditions hereof, the Plan should provide for the treatment of Claims against the Subsidiary Debtors and ACC as set forth herein.

WHEREAS, the Parties acknowledge the benefits and enhanced value to all stakeholders to be derived from implementation of the Settlement as compared with the Plan as currently structured and the additional and material costs, undertakings and obligations resulting from the continuation of the Motion In Aid process and the continued operation of the Debtors in chapter 11.

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[3] For purposes of this Agreement, the ACC Trade Claims shall also include Other Unsecured ACC Claims.

WHEREAS, the New Creditor Parties agree that, for purposes of initial distributions on the Effective Date, the Deemed Value of the TWC Class A Common Stock is $4.85 billion and that there shall be a true-up mechanism as more fully set forth herein.

WHEREAS, the Parties recognize and agree that consistent with section 510 of the Bankruptcy Code and the absolute priority rule, except as otherwise provided herein and unless otherwise agreed by the Parties, there will be no distributions other than junior CVV Interests to the holders of the ACC Subordinated Notes or to holders of equity interests in ACC.

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, each of the Parties to this Agreement hereby agrees as follows:

1. Each of the undersigned Parties will (a) except in the case of the Debtors with respect to provisions of the Modified Plan for which they are not co-proponents, support and authorize, notwithstanding prior directives to the contrary, a revised, modified and amended chapter 11 plan incorporating the terms, conditions and modifications set forth herein and containing no other plan provisions that are in conflict with this Agreement unless every affected Party consents in writing; and (b) in the case of the New Creditor Parties use best efforts to obtain a written agreement supporting (subject to the receipt of an approved Disclosure Statement consistent herewith) such revised, modified and amended chapter 11 plan from the other members of their respective *ad hoc* committees. All Parties shall sup-

port such plan (in the case of the Debtors, to the extent they are co-proponents) and to refrain from actions detrimental to confirmation of such plan. Upon execution of this Agreement by the Parties, the Debtors and Creditors' Committee, as co-proponents,[4] in cooperation with the other Parties, shall prepare and file with the Bankruptcy Court a revised, modified and amended plan wholly consistent with all provisions, terms and conditions of this Agreement (the "Modified Plan") and the Parties shall take all action and file all pleadings to obtain confirmation of the Modified Plan. Each of the co-proponents of the Modified Plan shall not withdraw, amend or modify the Modified Plan without the consent of the other co-proponent, not to be unreasonably withheld or delayed, provided, however, it shall not be unreasonable for a co-proponent to withhold consent to a proposed change that is inconsistent with this Agreement.

2. The Modified Plan shall contain the following terms and conditions:

Treatment of Bank Claims

(i) The Bank Claims (both Agent and Non-Agent) are Disputed Claims and subject to disallowance in whole or in part. The Debtors (subject to any limitations imposed by order of the Bankruptcy Court) and/or the Creditors' Committee (and their applicable successors under the Modified Plan) will pur-

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(4) With respect to the treatment of Bank Claims, the Creditors' Committee shall be the sole proponent, and the Debtors shall not be a proponent with respect to the treatment of the Bank Claims.

sue objections to all such Claims under all applicable provisions of the Bankruptcy Code, including among others, all applicable provisions of section 502, including subsection (d). Until either (x) all such disputes with regard to the Bank Claims have been resolved pursuant to an agreement among the Banks,[5] the Debtors, the Creditors' Committee, the FrontierVision Committee, the Arahova Committee, the ACC Committee, the Committee II and Huff, or (y) the Bank Claims have been Allowed by a Final Order, all Bank Claims are Disputed Claims. Unless and until otherwise Allowed, notwithstanding the occurrence of the Effective Date, no Bank may receive any distributions, and the Liens and/or security interests securing such Claims shall be transferred to and shall attach to the proceeds of the Sale Transactions (which proceeds will be retained by the Debtors pending resolution of the Disputed Bank Claims) in an amount sufficient to pay in full the maximum amount of the Disputed Bank Claims as determined by the Bankruptcy Court. If and when such Bank Claims are Allowed, the Banks shall receive a Cash distribution sufficient to give them the full amount to which they are entitled under the Bankruptcy Code with respect to such Allowed Claims, giving effect to all applicable provisions of the Code, including without limitation sections 502, 506 and 510. The Parties acknowledge it is the Debtors' position that the Debtors are obligated not to withhold distributions with respect to the Bank Claims (and are required to oppose such a withholding), absent a court order to the contrary.

(5) "Banks" shall mean all Bank Lenders.

(ii) The Creditors' Committee (i.e. as sole proponents of the Modified Plan with respect to the Bank Claims) shall have the right to assert that the Bank Claims are unimpaired pursuant to section 1124 of the Bankruptcy Code, and/or to seek to unimpair the Bank Claims. In the event that the Bankruptcy Court determines that the Bank Claims are impaired, and the Classes of Bank Claims reject the Modified Plan, the Creditors Committee as proponents of the Modified Plan with respect to the Bank Claims will seek confirmation of the Modified Plan over such rejection in accordance with section 1129(b) of the Bankruptcy Code.

The Parties stipulate to continue their good faith negotiations with the Banks regarding the Banks' plan treatment.

Bank Election

The Modified Plan shall provide that each Bank will have the right to elect to receive payment in full in Cash on the Effective Date of all outstanding principal and all accrued interest at the non-default interest rate in effect at the Commencement Date, subject to disgorgement upon the entry of a Final Order directing the return of some or all of such distribution (a "Disgorgement Order"). The Modified Plan shall also provide that any Bank making such election shall be deemed to have waived any objection to confirmation of the Modified Plan and any claim or entitlement to additional interest, post-Effective Date fees and expenses, and/or indemnification, and shall be deemed to have agreed to comply with any Disgorgement Order directed to it. Any Agent Bank electing the above treatment will be entitled to recover reasonable attorneys' fees

through the Effective Date as determined by a Final Order or pursuant to a mutual agreement among the Agent Bank, the Creditors' Committee, the FrontierVision Committee, the Arahova Committee, the ACC Committee, the Committee II and Huff. In addition, if all of the Non-Agent Banks elect such treatment, the *Ad Hoc* Committee of Non-Agent Secured Lenders will be entitled to seek on behalf of such Committee's professionals reimbursement of their fees and expenses incurred in connection with the Debtors' cases by submitting an application for reimbursement pursuant to sections 503(b)(3) and (4) of the Bankruptcy Code based upon their having made substantial contributions to the Debtors' cases.

Lender Indemnification Funds

The Modified Plan will not provide the Banks with any amounts for reimbursement or payment of their fees or expenses until such Claims become Allowed Claims. Pursuant to the Settlement, the amount currently reserved under the Plan will be released and distributed to ACC.

Treatment of Subsidiary Creditors

Arahova

Holders of Arahova Note Claims will receive payment in full of all principal and accrued interest at the simple, non-default contract rate through the Effective Date, provided that a total of $750 million comprised of: (i) $575 million of value contemplated by the Settlement Plan (the "$575 million

Give Up"), (ii) the Incremental Arahova Advance of $125 million, plus (iii) the Arahova Give Up of $50 million, of the amounts otherwise distributable to holders of the Arahova Notes Claims will be transferred to ACC for distribution to the holders of the ACC Senior Notes Claims and the ACC Trade Claims. The Incremental Arahova Advance and the Arahova Give Up shall bear interest from the Effective Date at the rate of 5% per annum (simple, non-compounded) until each is repaid as described below. In addition, after payment of the amounts under the Government Settlement, 50% of the next $1 billion of proceeds from the CVV (subject to the FrontierVision CVV Percentage) and 25% of the CVV proceeds in excess of such next $1 billion (subject to the FrontierVision CVV Percentage) will be allocated to holders of the Arahova Notes Claims until the holders of the Arahova Notes Claims have received $575 million plus all amounts paid by Arahova on account of the Arahova Fees (as defined below). After the holders of the Arahova Notes have received such amounts, they shall receive 20% of the remaining CVV proceeds (subject to the FrontierVision CVV Percentage) until interest accrued on the $575 million Give Up at the rate of 8.9% per annum (simple, non-compounded) has been paid without double counting, with the remaining proceeds to be distributed to holders of ACC Senior Notes Claims and ACC Trade Claims. For the avoidance of doubt, interest on the $575 million Give Up shall accrue at 8.9% (simple, non-compounded), but shall only be paid from the 20% of the CVV proceeds allocated to Arahova (subject to the FrontierVision CVV Percentage) following payment in full of the $575 million Give Up and the

Arahova fees. After all outstanding principal and accrued interest through the Effective Date has been paid to the holders of the Arahova Notes Claims, the FrontierVision Notes Claims, the ACC Senior Notes Claims and the ACC Trade Claims, the CVV proceeds will be used to repay the Arahova Give Up plus accrued interest until such amounts are paid in full.

In addition to the CVV proceeds described above, the $125 million Incremental Arahova Advance plus interest thereon shall be repaid and satisfied dollar for dollar from and shall have first and sole priority in the following sources (the "Identified Sources") as and when the same are available for distribution.

(i) Any amount of the non-sale related contingent tax reserves (estimated at $811 million) established by the Debtors in excess of $300 million that is released.

(ii) Any reduction of the Litigation Prosecution Fund from the proposed amount of $50 million to a reduced fund amount of $25 million or less.

(iii) Any reduction of the $100 million amount of the currently proposed reserves for post-Effective Date Administrative Expenses (inclusive of amounts reserved under the JV Plan).

(iv) [Intentionally omitted]

(v) Any reduction of the tax attributable to gains on the Sale Transactions below $655 million; provided, however, that the $655 million benchmark will be adjusted lower for (1) a plan value of $4.85 billion for TWC Class A Common Stock, and (2) the use of state net

operating losses to reduce the tax liability to $443 million.

(vi) Any amounts earmarked for distribution to ACC Senior Notes Claims by the Government under the Government Settlement or through the Modified Plan. The New Creditor Parties shall undertake steps to cause the Government to distribute the maximum amount of the Government Settlement for the account and benefit of ACC Senior Notes Claims; provided, however that nothing herein shall be deemed to prohibit any Party from seeking to obtain such distributions for the benefit of other ACC securities in which such party has an interest.

No payment on the $125 million Incremental Arahova Advance shall come from the CVV. Prior to the Effective Date, all New Creditor Parties, and following the Effective Date, all Parties, the Plan Administrator and the CVV Directors shall use their best efforts to cause the Identified Sources to be released and/or maximized to the fullest extent possible.

FrontierVision

Holders of the FrontierVision Notes will receive payment in full of all principal and accrued interest at the simple, non-default contract rate through the Effective Date, provided that, $85 million (the "FrontierVision Give Up") (comprised of the $60 million contained in the Settlement Plan plus an additional $25 million) will be transferred for distribution to the holders of the ACC Senior Notes Claims and the ACC Trade Claims. The Fron-

tierVision Committee shall determine in its sole discretion the allocation of the FrontierVision Give Up between the FrontierVision Holdco Notes and FrontierVision Opco Notes.

With respect to the $85 million FrontierVision Give Up, holders of the FrontierVision Notes participating in the FrontierVision Give Up following the allocation of the FrontierVision Give Up between the FrontierVision Holdco Notes and FrontierVision Opco Notes (the "Participating FrontierVision Noteholders") shall be provided with senior CVV interests so that the FrontierVision Notes will dilute the senior CVV interests distributed to ACC and Arahova pro rata to the limited extent as follows: after payment of the amounts due to the Government under the Government Settlement or as otherwise agreed by the Government, with respect to each dollar of CVV recovery, the Participating FrontierVision Noteholders shall receive a percentage of each dollar of CVV recovery (the "FrontierVision CVV Percentage") as determined, as of the Effective Date, by a fraction the numerator of which shall be $85 million plus any unpaid fees and expenses of the FrontierVision Committee and the FrontierVision Notes Indenture Trustee in excess of the $5 million provided herein, and the denominator shall be (a) the total of the $575 million Give Up by Arahova, plus (b) the dollar value of the ACC deficiency on the Effective Date (meaning the amounts necessary to pay the Allowed amount of all ACC Senior Notes Claims and ACC Trade Claims in full, plus all post-petition interest accrued through the Effective Date); provided that in any event, the FrontierVision CVV Percentage shall be no less than 2.5% per $1 billion

of CVV recovery. CVV proceeds will be distributed to Participating FrontierVision Noteholders in the same manner and at the same time as CVV proceeds are distributed to holders of the Arahova Notes Claims and ACC Notes Claims.

Olympus & FPL Note

Holders of Olympus Note Claims and FPL Note Claims will receive payment in full of all principal and accrued interest at the simple, non-default contract rate through the Effective Date, provided that up to $30 million of the post-petition interest accrued through July 31, 2006 (the "Olympus & FPL Note Give Up") will be transferred for distribution to the holders of the ACC Senior Notes Claims and the ACC Trade Claims. The allocation of the Olympus and FPL Note Give Up among the holders of the Olympus Notes and the holders of the FPL Note shall be determined by agreement of the parties.

Subsidiary Trade Claims/
Other Unsecured Subsidiary Claims

Holders of Subsidiary Trade Claims and Other Unsecured Subsidiary Claims will receive payment in full of all principal and accrued interest through the Effective Date, provided that $46 million (the "Trade and Other Unsecured Give Up") (which shall be allocated pro rata between classes of (and the holders of such) Subsidiary Trade Claims (subject to the last paragraph of this Section), on the one hand, and classes of (and the holders of such) Other Unsecured Subsidiary Claims, on the other hand, based on the respective reserves set up for each as

described below such that the Give Up for the Subsidiary Trade Claims shall be $39.2 million and the Give Up for the Other Unsecured Subsidiary Claims shall be $6.8 million) will be transferred for distribution to the holders of the ACC Senior Notes Claims and the ACC Trade Claims. Subject to the Trade and Other Unsecured Give Up, the holders of Subsidiary Trade Claims and Other Unsecured Subsidiary Claims will be entitled to post-petition interest at the 8% rate specified in the Plan Support Agreement. The Modified Plan shall separately classify the Subsidiary Trade Claims and the Other Unsecured Subsidiary Claims consistent with the Plan.

The Debtors have disclosed in the April 2006 Disclosure Statement Supplement the existence of $746.4 million in undisputed and disputed Subsidiary Trade Claims (including accrued interest of $179.9 million estimated through July 31, 2006 which amount shall be increased to accommodate the effective date of the Modified Plan) (the "Trade Reserve") and $196 million in undisputed and disputed Other Unsecured Subsidiary Claims (including accrued interest of $31.2 million estimated through July 31, 2006 which amount shall be increased to accommodate the effective date of the Modified Plan) (the "Unsecured Reserve" and together with the Trade Reserve, the "Claims Reserves").[6] To the extent that all Subsidiary Trade Claims are Allowed in an aggregate amount of less than the Trade Reserve, or the Other Unsecured

[6] All of the numbers in the preceding sentence include Trade Claims and Other Unsecured Claims against the JV Debtors which will be satisfied pursuant to the Debtors' JV Plans.

Subsidiary Claims are Allowed in an aggregate amount of less than the Unsecured Reserve, the first $46 million (allocated $39.2 million to Subsidiary Trade Claims and $6.8 million to Other Unsecured Subsidiary Claims) released from the respective reserve shall be paid (with interest earned on such amounts in the reserves) to holders of Subsidiary Trade Claims and Other Unsecured Subsidiary Claims to repay the Trade and Other Unsecured Give Up. For the avoidance of doubt, (i) if less than $46 million (allocated $39.2 million to Subsidiary Trade Claims and $6.8 million to Other Unsecured Claims) is released from the Claims Reserves, the Trade and Other Unsecured Give Up shall not be repaid from any other sources, (ii) no holder of a Subsidiary Trade Claim or Other Unsecured Subsidiary Claim shall receive in excess of the face amount of their Claim plus (x) interest accrued through the Effective Date at a rate of 8% (simple, non-compounded), (y) earnings by any holder of a Disputed Claim that subsequently becomes Allowed on any Cash, stock or other property in any reserves established for the payment of such Claims, and (z) any interest earned on the Cash in the respective reserves used to repay such holder's Trade and Other Unsecured Give Up and (iii) holders of Subsidiary Trade Claims will only be repaid from the Trade Reserve and holders of Other Unsecured Subsidiary Claims will only be repaid from the Unsecured Reserve.

The Subsidiary Trade Committee shall have input on the allocation of the Trade and Other Unsecured Give Up among Debtors and Debtor Groups.

Existing Securities Laws Claims

Existing Securities Laws Claims (i.e. against the Subsidiary Debtors), to the extent Allowed, shall, if their respective classes vote to accept the Modified Plan, receive junior CVV interests, junior in all respects to the payment in full including post-petition interest and CVV interest to Arahova Notes Claims, ACC Senior Notes Claims, ACC Trade Claims and FrontierVision Notes Claims but senior to any CVV interests distributed to holders of junior debt and equity.

Treatment of Claims Asserted Against the Holding Company Debtors

Total Distribution

Subject to the repayment of the Incremental Arahova Advance of $125 million plus interest solely as provided herein, on the Effective Date, the Holding Company Debtor Group shall receive the following amounts, and cause them to be distributed in accordance with the allocation described below: (a) the Initial ACC Settlement Consideration of $635 million; plus (b) the $445 million of Incremental ACC Settlement Consideration; plus (c) after payment of the amounts under the Government Settlement, 50% of the next $1 billion of proceeds of the CVV (subject to the FrontierVision CVV Percentage of such $1 billion (i.e., no less than $25 million) being distributed to the Participating FrontierVision Noteholders), 75% of the CVV proceeds in excess of such next $1 billion (subject to the FrontierVision Percentage of such $1 billion (i.e., no less than $25 million) being distributed to the Participating FrontierVision Noteholders), until such time as the

$575 million Give Up and the fees and expenses reimbursed by the Debtors and allocated to Arahova have been repaid in full, and thereafter 80% of the CVV proceeds (subject to the FrontierVision CVV Percentage of the remaining CVV proceeds being distributed to the Participating FrontierVision Noteholders) until all interest earned on the $575 million Give Up has been paid to Arahova; plus (d) interest earned on the CVV consistent with the Arahova treatment, supra (*Treatment of Subsidiary Creditors—Arahova*); plus (e) any remaining Sale Proceeds and any other remaining property after distribution to the Subsidiary Debtors.

Distribution to creditors of the Holding Company Debtor Group shall be made on a *pro rata* basis in respect of the ACC Senior Notes Claims, the ACC Subordinated Notes Claims, ACC Trade Claims and the ACC Other Unsecured Claims, provided that holders of the ACC Senior Note Claims shall receive the benefit of subordination of the ACC Subordinated Notes.[7]

Incremental ACC Settlement Consideration

The minimum of $270 million portion of the Incremental ACC Settlement Consideration (the "Third Party Give Ups") shall be obtained from any combination of the following sources:

(1) The up to $30 million Olympus & FPL Note Give Up;

(2) The $25 million FrontierVision Give Up in excess of $60 million;

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[7] The existence and enforceability of the contractual subordination rights of the Rigas Subordinated Note Claims shall be determined by the Bankruptcy Court.

(3) The $46 million Trade and Other Unsecured Give Up;

(4) The $175 million that the Debtors have earmarked in the Plan for the Lender Indemnification Funds or otherwise to the Banks; and

(5) The Identified Sources in excess of the amounts necessary to repay the Incremental Arahova Advance.

Junior Creditors and Equity Interests

Because the value of the Debtors' estates is insufficient to provide any distributions to holders of junior Claims and equity interests, junior creditors and equity interests are not entitled to a distribution under the Modified Plan. In order to facilitate a consensual confirmation of the Modified Plan, however, the bondholders and other senior unsecured creditors that accept the Modified Plan will be deemed to have agreed, out of largess, to provide holders in each class of junior creditors and equity interests that vote to accept the Modified Plan with junior CVV Interests. Such CVV Interests shall be junior and subordinate in all respects to payment in full of all principal, accrued pre- and post-petition interest (including interests earned on the CVV Interests) and fees and expenses payable in accordance with the terms herein. In the event a class of junior creditors or equity holders does not accept the Modified Plan, the junior CVV Interests allocated to it shall be cancelled.

Matters Relating to the APA

Debtors' Duties

The Debtors shall, in the context of any ongoing activities relating to the Sale Transactions, use their best efforts to maximize the value and minimize the costs of the Sale Transactions to the fullest extent possible consistent with existing contractual commitments and applicable law.

Taxes related to the Purchase Agreements

The Debtors will use their best efforts to ensure that the Sale Transactions are effectuated in the most tax efficient manner so that the Debtors receive maximum tax efficiency. The Parties shall cooperate to enter into reasonable agreements and the co-proponents shall seek appropriate findings or other relief from the Bankruptcy Court based upon record evidence to the extent necessary or desirable to achieve such results. Such findings shall be made in connection with confirmation of the Modified Plan and the Parties agree that no such findings shall prejudice any party in the MIA proceedings in any respect and such findings shall not be admissible in any further MIA proceedings in the event that the Effective Date does not occur.

Contingent Value Vehicle

Governance

The CVV shall be governed by a five (5) member board of directors. The ACC Committee shall choose two (2) members and each of Huff and the

Committee II shall select one member of the CVV board. The remaining member shall be selected by the unanimous consent of the ACC Committee, Huff and Committee II. If such parties cannot unanimously agree on the fifth member of the CVV Board, such board member shall be elected by holders of the ACC Senior Notes, the Arahova Notes and the FrontierVision Notes Claims (in proportion to the amounts of CVV Interests held by such persons) on the record date for such election. Such election shall be conducted by the Debtors subject to the supervision of the Bankruptcy Court with a record date of entry of a Confirmation Order. Each $1,000 bond shall be entitled to one vote. The nominee that receives the highest number of votes shall be elected. Cumulative voting shall not be permitted. In such an election, persons or entities holding, in the aggregate, no less than $100 million in aggregate principal amount of unpaid bonds or notes that are to receive distributions from the CVV may nominate persons to serve as a director of the CVV. Each of the CVV board members shall be qualified to serve as a director for a public corporation (and in the case of the initial directors, disclosed to the Debtors at least five (5) business days prior to the confirmation hearing) and without regard to appointment, shall be fiduciaries for and shall exercise sound business judgment and fiduciary duties on behalf of all holders of CVV interests. The CVV governance documents shall be reasonably satisfactory to each of the Parties receiving CVV Interests hereunder.

Transferability

The CVV interests shall be transferable. The Parties acknowledge that the transferability of the CVV interests shall be subject to the requirements of applicable law, and nothing herein (including provisions regarding plan proponency) shall require a Party to violate applicable law. To the extent required, each of the board members shall satisfy applicable requirements of law and listing exchanges to permit the CVV interests to be freely transferable. The requirement that the CVV interests be transferable may be waived only by joint consent of the ACC Committee, FrontierVision Committee, Arahova Committee, Committee II and Huff.

Interest

The CVV Interests shall be issued in $1,000 denomination and each CVV Interest shall bear interest at the rate of 8.9% per annum (without double counting). Interest shall accrue and continue to bear interest until payment in full of the ACC Senior Notes Claims and the ACC Trade Claims plus accrued interest through the Effective Date.

Miscellaneous Plan Provisions

Government Settlement

With respect to the $715 million Government Settlement, the New Creditor Parties believe that, consistent with the absolute rule of priority, the $715 million should be distributed to holders of the ACC Senior Notes Claims, the Arahova Notes Claims, the FrontierVision Notes Claims, the Olympus Notes

Claims and holders of ACC Trade Claims. The Debtors will facilitate discussions between the New Creditor Parties and the United States Attorney for the Southern District of New York in connection with the New Creditor Parties' efforts to obtain the consent of the United States Department of Justice (the "DOT") for the $715 million to be distributed as provided herein. The Debtors shall (to the extent permitted by the third sentence of Section 2 of the letter agreement with the U.S. Department of Justice, dated April 25, 2005) advocate that the Government distribute the Restitution Fund as provided herein.

True-up Mechanism

A reserve (the "Reserve") of TWC Class A Common Stock or Cash to the extent there is not sufficient stock available) shall be created and withheld from initial Effective Date distributions (the "Reserve Stock") pending a market valuation of such stock (the "Market Value"). Such Reserve shall be sufficient to permit the upward or downward adjustment of the total number of shares received as final satisfaction of any non-ACC claim based upon a Market Value that is up to fifteen percent higher or lower than Deemed Value (the "True-Up Differential"). If the Comcast Redemption occurs prior to October 20, 2006, or if Comcast has waived its preemption rights prior to October 20, 2006, the Market Value shall be based upon the 60 day (the "Test Period") volume weighted average trading price commencing on the first business day that is 60 days following the initial distribution (the "Waiting Period"). If the Comcast Redemption has not

occurred prior to October 24, 2006, and Comcast has not waived its preemption rights, the Test Period and the Waiting Period shall be each shortened to the extent necessary to provide for the distribution of Reserve Stock no later than October 31, 2006, but in no event shall the Test Period be less than 14 calendar days. If reserving for a True-Up Differential of up to fifteen percent would prevent the Debtors from making an initial distribution of TWC Class A Common Stock through the Modified Plan pursuant to section 1145 of the Bankruptcy Code (without an initial public offering) that constitutes a "Termination Event" as defined in the Adelphia Registration Rights Agreement, the maximum amount of stock that permits such initial distribution to be made through the Modified Plan under the TWC Sale Documentation (without an initial public offering) and still constitute a "Termination Event" shall be reserved and the balance shall be reserved in Cash. After completion of the Test Period, Reserve Stock shall be released and distributed accordingly such that the total amount of TWC Class A Common Stock received on account of any non-ACC claim shall be based upon the Market Value; provided, however, that any true-up (or true-down) is limited to the amount of Reserve Stock (or cash reserved in lieu thereof) available and shall not exceed a True-Up Differential of greater than fifteen percent. For the avoidance of doubt, no creditor shall be required to return any TWC Class A Common Stock or other Plan Consideration once distributed. All amounts reserved but not released and distributed to non-ACC creditors following the Test Period shall be released and distributed to the cred-

itors of ACC in accordance with the treatment otherwise provided herein.

Non-Sale Related Tax Measure

With respect to the tax reserves for taxes other than those that result from the asset sales contemplated by the Purchase Agreements, the Parties shall cooperate to enter into reasonable agreements and the co-proponents shall seek appropriate findings or other relief from the Bankruptcy Court based upon record evidence to the extent necessary or desirable to achieve maximum tax efficiency. Such findings shall be made in connection with confirmation of the Modified Plan and the Parties agree that no such findings shall prejudice any party in the MIA proceedings in any respect and such findings shall not be admissible in any further MIA proceedings in the event the Modified Plan is not substantially consummated.

Compensation and Reimbursement

The Parties shall support in all respects, and the Modified Plan shall provide for, reasonable compensation and reimbursement of all fees and expenses that have been properly documented for the FrontierVision Committee, the Arahova Committee, the ACC Committee, the Committee II, the ACC and Subsidiary Trade Committees, Huff and the Indenture Trustees for the FrontierVision, ACC and Arahova Notes pursuant to section 503(b)(3) and (4) of the Bankruptcy Code. All of the fees and expenses of the Arahova Committee shall be allocated to Arahova, one-third of the Committee II's

fees and expense shall be allocated to Arahova and the remainder to ACC and, the fees and expenses of Huff shall be allocated to Arahova and ACC based upon holdings and the fees of the FrontierVision Committee in excess of $5 million shall be allocated to FrontierVision (the fees and expenses allocated herein to Arahova are referred to as the "Arahova Fees"). For greater certainty, and except with respect to an award of professional fees and expenses to the FrontierVision Committee, under Section 503(b)(3) and (4) in an amount up to $5 million and an award under section 503(b)(3) and (4) to the ACC Trade Committee and the Subsidiary Trade Committee in the aggregate amount of up to $5 million, which awards, if any, shall be paid as an administrative expense and without reducing distributions to holders of FrontierVision Note Claims and holders of Subsidiary Trade Claims, respectively, fees allocated to estates pursuant to the preceding sentence shall reduce distributions to the creditors of such estates otherwise specified herein and shall only be recoverable through their CVV participation. This provision is subject to any requirements of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure requiring application and approval by the Bankruptcy Court in accordance with United States Trustee guidelines.

Allocation of Consideration

All Cash available (after payment or reserve on account of Bank Claims and after funding of plan reserves) on the Effective Date shall be distributed *pro rata* to holders of Claims against the Subsidiary Debtors and the remainder of the distributions to the

holders of Claims against the Subsidiary Debtors shall be made in TWC Class A Common Stock.

Documentation

All documentation shall be in form and substance reasonably acceptable to the Parties.

Releases and Exculpation

The Modified Plan, by agreement of the Parties, shall provide for the mutual release of each of the Parties, its members, professionals and agents for all actions taken in connection with the chapter 11 cases through the Effective Date. Nothing in this provision shall release any of the Parties' obligations hereunder. The Modified Plan shall provide for releases for the Debtors, their directors, officers, employees, professionals and agents to the same extent as set forth in the Plan.

Plan Administrator

The Parties acknowledge the need to provide for the transition of services following the closing of the Sale Transaction and that it would be in the best interests of the Debtors' estates to commence the process for the transition of services as soon as is reasonably practicable. The New Creditor Parties shall jointly nominate a Plan Administrator no later than sixty (60) days after the Execution Date.

3. [Intentionally omitted].

4. This Agreement does not include a description of all of the terms, conditions and other provisions to be contained in the Modified Plan and related plan docu-

ments, all of which remain subject to discussion and negotiation among the Parties.

5. Without in any way limiting any of the undertakings and obligations of any Party hereunder, whenever "best efforts" is required in the Agreement: (i) there is an element of commercial reasonableness in every best efforts obligations; and (ii) the mere failure of a Party to achieve an objective for which best efforts is required shall not result in a default by the Party and shall not give rise to a claim against the Party or its employees and agents, provided that such Party used such best efforts.

6. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall constitute one and the same agreement. Delivery of an executed counterpart of a signature page by facsimile shall be as effective as delivery of a manually executed counterpart.

7. Notwithstanding anything to the contrary contained herein, this Agreement and its provisions may not be modified, amended, waived or supplemented except in a writing signed by each of the Parties. For the avoidance of doubt, the Modified Plan (which Modified Plan shall be wholly consistent with all provisions, terms and conditions of this Agreement) shall not be deemed to be an amendment of this Agreement.

8. Upon execution hereof, each of the Parties consents to the adjournment of the Motion in Aid Hearings through August 31, 2006. Until July 31, 2006, and thereafter upon the filing of the Modified Plan and related disclosure statement or supplement consistent in all material respects with the terms hereof and the approval of the disclosure statement or supplement, the Motion in

Aid Hearings and the related Rule 2004 discovery pertaining to the ACC Committee shall be adjourned so long as the Modified Plan has not been withdrawn, terminated or modified in a manner adverse to a Party absent written consent of such Party; provided, however, in the event that any party subject to the Rule 2004 order acts in a manner inconsistent with this Agreement (whether by opposing this Agreement, engaging in motion practice, objecting to confirmation of the Modified Plan or otherwise), the 2004 discovery and any and all process relating to the subject matter of the 2004 discovery shall proceed with respect to such party. Voting with respect to the Modified Plan by an entity that is not a Party to this Agreement shall not, in and of itself, be considered an act inconsistent with this Agreement. Except as specifically provided for herein, this Agreement shall not limit or affect in any way any rights, liabilities of or claims against any entity that is not a Party to this Agreement, including but not limited to claims now held or that may hereafter be asserted by any Party.

9. The Debtors shall use their best efforts to: (i) implement the terms hereof and shall take all actions necessary to confirm the Modified Plan to the extent they are co-proponents thereof, (ii) cooperate with the New Creditor Parties in connection with the prosecution and implementation of the Modified Plan and the transactions contemplated thereby, (iii) meet regularly with the New Creditor Parties and fully cooperate in the transition of the Debtors following the closing of the TWC Sale and following confirmation of the Modified Plan and work in good faith to prepare, negotiate and enter into an agreement (the "Transition Agreement") for the transition of Debtors' management at an appropriate time as set forth in section *Plan Administrator*, *supra*, and (iv) object to Claims and to resolve Disputed Claims

as expeditiously as practicable and cooperate fully with the Subsidiary Trade Committee with respect to objections to and to the allowance or disallowance of Claims.

Without in any way impacting or affecting the terms of the Transition Agreement, subject to the applicable limitations imposed by law (including Regulation FD) and confidentiality obligations, to the extent practicable:

A. On or prior to the closing of the Sale Transaction, the Debtors shall consult with a designee of the Creditors' Committee (the "Committee Designee")[8], with respect to any decisions reasonably expected to (i) materially reduce the proceeds to be received from the Buyers in the Sale Transaction below the proceeds projected by the Debtors in the information provided to the Creditors' Committee in May 2006, or (ii) materially increase the liability of the Debtors to third-parties (such as taxing authorities and litigation claimants) above the levels projected by the Debtors in the information provided to the Creditors' Committee on May 2006, and

B. After the closing of the Sale Transaction—

(i) the Debtors shall consult with the Committee Designee with respect to actions

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[8] The Creditors' Committee shall select the Committee Designee in its sole discretion; provided, however, that (a) the Committee Designee shall have such experience and qualifications as are sufficient to enable the Committee Designee to perform its functions hereunder, (b) the Committee Designee shall not be a member of the Creditors' Committee or an employee or affiliate of a member of the Creditors' Committee, and (c) the Committee Designee shall be subject to Bankruptcy Court approval.

that would reasonably be expected to materially adversely impact creditor recoveries projected by the Debtors in the information provided to the Creditors' Committee in May 2006, and with respect to any matters as to which the Debtors are required by this agreement to consult with the creditors, including the distribution of the Restitution Fund and adjustments to the Sale Transaction (collectively, the "*Subject Actions*"). To the extent practical, (a) such consultations shall be conducted in a time frame, and accompanied by information, so as to reasonably enable the Committee Designee to provide informed advice to the Creditors' Committee and informed input to the Debtors with respect to such matters, and (b) such Committee Designee will be included in any meetings with representatives of the Department of Justice (subject to consent by the Department of Justice) that are attended by an executive officer of the debtors, and, subject to the consent of Time Warner and Comcast, any meetings with such companies attended by an executive officer of the Debtors at which such officer reasonably anticipates new, material information will be made available by the Debtors or such companies, or the possibility of new, material concessions by either the Debtors or the Buyers will be discussed;

(ii) the Debtors will meet regularly with the Committee Designee to update such Committee Designee on material matters impacting distributable value;

(iii) all consultations referred to herein will be with senior executives of the Debtors, which consist of the CEO and the Executive Vice Presidents. At the sole and absolute discretion of such senior executives, employees at lower levels will be made available for such consultations; and

(iv) the consultations with the Committee Designee provided for herein are not intended to exclude high-level consultations with the Creditors' Committee not involving duplication or undue burden on the Debtors.

If the Committee Designee reasonably believes that a Subject Action is not in the best interests of the Debtors' estates, the Committee Designee shall set forth in reasonable detail the basis for such belief in written notice to the Debtors (the "Objection Notice"), and (a) if on or prior to the closing of the Sale Transaction, the Committee Designee shall have the right to seek, on an expedited basis, an order of the Bankruptcy Court prohibiting the Debtors from taking a Subject Action, (b) if after the closing of the Sale Transaction, the Debtors receive an Objection Notice with respect to a Subject Action, the Debtors shall not take such Subject Action pending an order of the Bankruptcy Court, and the Debtors shall have the right to seek, on an expedited basis, an order of

the Bankruptcy Court granting the Debtors the authority to take such Subject Action,

Nothing in this Agreement shall be interpreted to require the Debtors to take any actions that would, in their reasonable judgment constitute a violation or breach of, or constitute a waiver of material rights under, the Government Settlement Agreement, the Purchase Agreements, the Sale Order, the Debtors JV Plan or the Confirmation Order.

10. The Creditors' Committee (in cooperation with the Parties) shall have primary responsibility for the documentation and prosecution of the Modified Plan and all related supplements. The Debtors shall have primary responsibility (in cooperation with the Parties) for the documentation of all necessary disclosure and balloting materials. Each of the co-proponents shall be provided with a meaningful opportunity to review and comment on all drafts and pleadings related to the Modified Plan prior to filing with the Bankruptcy Court.

11. Unless otherwise agreed to in writing by the Parties as set forth below, it shall be a condition of the Effective Date of the Modified Plan that (i) the Effective Date of the Modified Plan shall be the later of September 15, 2006 or 15 days after the closing of the TWC Sale, but in no event shall such Effective Date be later than October 31, 2006, (ii) distribution of TWC Class A Common Stock to creditors shall be materially completed prior to October 31, 2006, and (iii) the Debtors shall be in a position to distribute to ACC on the Effective Date or immediately thereafter the ACC Effective Date Settlement Distribution totaling at least $1.080 billion (before deducting the Reserve relating to the True-Up Mechanism) from the Initial ACC Settlement Consideration, the Third Party Give Ups, the Incre-

mental Arahova Advance and Identified Sources above $125 million. The conditions in clauses (i) and (ii) may be waived in writing by agreement of all the Parties. The condition in clause (iii) may be waived in writing by the ACC Committee.

12. In the event the Modified Plan is not confirmed, this Agreement shall be null and void and of no force and effect.

13. In the event there is any dispute or disagreement between the New Creditor Parties regarding the meaning or interpretation of this Agreement, the Monitor shall resolve any and all disputes fully and finally, *provided, however*, such determination shall not be binding on the Debtors absent an order of the Bankruptcy Court with respect to the Debtors' obligations hereunder. All other disputes shall be resolved by the Bankruptcy Court.

14. Any creditor or group of creditors can become a Party to this Agreement by executing a joinder, in form and substance satisfactory to the Parties, agreeing to be bound by the terms hereof.

15. Notwithstanding anything to the contrary contained herein, none of the Third Party Give Ups from any Party shall increase without the written consent of such Party and such consent may be withheld at such Party's sole discretion.

16. The Debtors' obligations under this Agreement shall be subject to the entry by the Bankruptcy Court of an order approving a disclosure statement with respect to the Modified Plan and authorizing the Debtors to propose the Modified Plan as provided herein. The co-proponents shall seek to pursue and achieve the solicitation of the Modified Plan as soon as reasonably possible.

IN WITNESS WHEREOF, each of the Parties has caused this Agreement to be executed and delivered by its duly authorized officers as of the date first written above.

Agreed and Accepted by:

W.R. HUFF ASSET MANAGEMENT CO., L.L.C.

/s/ Michael McGuiness
By: Michael McGuiness

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP

/s/ Brad Eric Scheler
By: Brad Eric Scheler, Esq.
A Member of the Firm

Counsel to W.R. Huff Asset Management Co., L.L.C.

APPALOOSA MANAGEMENT LP

/s/ Ronald Goldstein
(by Gerard Uzzi, as attorney-in-fact)
By: Ronald Goldstein

DEUTSCHE BANK SECURITIES INC.

/s/ Matthew Doheny
(by Gerard Uzzi, as attorney-in-fact)
By: Matthew Doheny

WHITE & CASE LLP

/s/ Gerard Uzzi
By: Gerard Uzzi, Esq.

/s/ Christopher Shore
(by Gerard Uzzi, as attorney-in-fact)
By: Christopher Shore, Esq.

Counsel to the Ad Hoc Committee of Arahova Noteholders (Except with respect to the treatment of the Bank Claims)

TUDOR INVESTMENT CORPORATION

/s/ Darryl Schall
By: Darryl Schall

HIGHFIELDS CAPITAL

/s/ Joseph Mazzella
By: Joseph Mazzella

FRANKLIN MUTUAL ADVISERS, LLC

/s/ Bradley Takahashi
(by Alan Lungen, as attorney-in-fact)
By: Bradley Takahashi

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By: Jon Lukomnik

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AD HOC ADELPHIA TRADE CLAIMS COMMITTEE
[Referred to herein as the Subsidiary Trade Committee]

/s/ Steven Pohl
By: Steven Pohl, Esq.

BROWN RUDNICK BERLACK ISRAELS LLP

/s/ Steven Pohl
By: Steven Pohl, Esq.

Attorneys for the Ad Hoc Adelphia Trade Claims Committee

OFFICIAL COMMITTEE OF UNSECURED CREDITORS

/s/ Michael McGuiness
By: Michael McGuiness
Its: Chairperson

KASOWITZ, BENSON, TORRES & FRIEDMAN LLP

/s/ David Friedman
(by Alan Lungen, as attorney-in-fact)
By: David M. Friedman, Esq.

Attorneys for the Official Committee of Unsecured Creditors

ADELPHIA COMMUNICATIONS CORP.
(for itself and on behalf of each of the Debtors)

/s/ William T. Schleyer
By: William T. Schleyer
Its: Chairman and Chief Executive Officer

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11 Cases
Case No 02-41729 (REG)
Jointly Administered
1: 07 CIV. 1172 (SAS)

IN RE

ADELPHIA COMMUNICATIONS CORPORATION, *et al.*,

Debtors.

ACC BONDHOLDER GROUP,

Appellants

—v.—

ADELPHIA COMMUNICATIONS CORPORATION, *et al.*,

Appellees.

PLAN PROPONENTS' MEMORANDUM OF LAW IN RESPONSE TO APPELLANTS' BRIEF ON MOOTNESS

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Appellees Adelphia Communications Corporation and certain of its affiliates (collectively, the "Debtors") and the Official Committee of Unsecured Creditors in the Debtors' chapter 11 cases (the "Creditors Committee," and together with the Debtors, the "Proponents") submit this memorandum of law in response to Appellants' brief on mootness.

PRELIMINARY STATEMENT

After contending for weeks in this Court and in the Second Circuit that they were entitled to a stay of the Confirmation Order because, absent one, the Debtors would substantially consummate the Plan and render the Appeal moot, Appellants now turn 180 degrees and announce that the Appeal is not moot after all. Yesterday, disgorgement was both unavailable and an ineffective remedy; today disgorgement "affords effective relief without unfairness, let alone unfairness rising to the level of equitable mootness." Brief of Appellants in Opposition to Claims of Mootness and Equitable Mootness ("Apps' Mootness Br.") at 4. On basic principles of judicial estoppel, this Court should dismiss the Appeal as moot given Appellants' prior inconsistent positions.

Even if Appellants could disavow their prior position in this Court and the Second Circuit—which they cannot—the facts and the law have not changed. Substantial consummation of the Plan has rendered the Appeal moot. Effective relief cannot be granted to Appellants, including in the form of disgorgement or otherwise, without unfairly affecting the rights of the Government, Time Warner, and the thousands of innocent stakeholders and other parties who have relied on a Confirmation Order and Plan that Appellants elected to allow to become

effective by deciding not to satisfy the conditions to a stay by this Court.

Appellants' gamesmanship and lack of candor with this Court and the Second Circuit in failing to inform either court until literally the last minute that they would never post a bond greater than $10 million as a condition to issuance of a stay, resulted in interim stays lasting 31 days and costing the Debtors' stakeholders at least $74.4 million in incremental interest costs alone. Appellants' attempts to distance themselves from their prior positions here and in the Second Circuit further demonstrate their willingness to sacrifice candor for expedience.[1]

Appellants' misdirection continues even in this brief. While they purport here to suggest a form of limited relief that the Court can fashion if the Appeal succeeds, without impacting other aspects of the consummated Plan, their appeal brief filed three weeks ago and their reply brief on appeal filed two days prior to the mootness brief tell a different story: Appellants ask that "the Plan and Confirmation Order . . . be reversed" in their entirety (Appeal Br. at 2, Feb. 7, 2007) and that "the Court enter an order reversing the Bankruptcy Court's Confirmation Order" in its entirety (Reply Br. at 26, Feb. 21, 2007). Appellants manipulated the judicial process at the expense of thousands of innocent stakeholders for what has become a lengthy and extremely expensive frolic. It is time to end this misadventure and dismiss the Appeal as moot.

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[1] "He who seeks Equity, must do Equity." Story, *Commentaries on Equity Jurisprudence* 1:77 (1836). Appellants have done anything *but* equity.

BACKGROUND

I. Appellants' Stay Motion.

The keystone of Appellants' motion for an emergency stay was their assertion, which this Court accepted, that absent a stay, the Appeal would be moot:

> As I read your papers, and as I read your answer to the question I posed over the weekend, I think you concede that the irreparable harm would be the loss of any opportunity to have full appellate review . . . because, this is such a complex bankruptcy that if distribution occurs, it could never be unraveled. And there would be a powerful mootness argument. And so I think you're saying, that's our irreparable harm.

(Jan. 16 H'rg Tr. (Court) at 12:11-20.) Mootness, and mootness alone, was the irreparable harm Appellants identified to this Court. *See* Appellants' Jan. 15, 2007 Letter to District Court (the "Jan. 15 Letter") at 2. Consummation of the Plan, Appellants warned, would pose insurmountable "problems in recovering stock and CVV interests from entities that have sold or encumbered them." *Id.* at 4.

> The effectiveness of the Plan, among other things, (i) provides defenses to disgorgement to all entities receiving distributions and (ii) authorizes the Plan Administrator to take actions that may render subsequent relief impossible. The Plan's effectiveness triggers other consequences as well, such as releases of and exculpation for various entities. For these and other reasons generated by other provisions of the Plan, the potential disgorgement remedy would

> not eliminate severe risks of mootness and equitable mootness absent the protections we list below.

Appellants' Jan. 19, 2007 Letter to District Court (the "Jan. 19 Letter") at 1-2.

Having succeeded in this Court, Appellants repeated their claim of mootness in the Second Circuit: "Appellants are entitled to a stay . . . because . . . as determined by the District Court, . . the public interest favors a stay when, *as here*, failing to grant a stay will eliminate appellate review of a Confirmation Order disbursing value of at least $17 billion." Appellants' 2d Cir. Emergency Mot. Mem. at 21. "[I]it would be unfairly prejudicial to allow Proponents to consummate the Plan without giving Petitioners an effective opportunity for appellate review . . . ." Appellants' Brief in Support of Stay Pending Mandamus Petition, at 31. "As the Bankruptcy Court recognized, absent a stay, Appellants will suffer irreparable injury as billions in cash and TWC Stock are distributed on the Effective Date and the Plan becomes substantially consummated . . ." Brief in Support of Emergency Motion of Appellants for Stay Pending Appeal and Expedited Appeal (Jan. 9, 2007) at 2.

Appellants repeated their mootness argument for the third time when they returned to this Court, after the Second Circuit dismissed their appeal of the Stay Order, seeking elimination of the bond requirement: "The relief requested is critical. We are asking to avoid mootness." Feb. 12 H'rg Tr. (Mr. Bienenstock) at 8:18-9:1.

Another key element of Appellants' motion for a stay was their deliberate failure to disclose that they were never prepared to post a meaningful bond. Appellants kept this information so close to the vest that, even after three courts had heard their request for a stay, the Second Circuit and this Court still offered Appellants an

opportunity to offer an alternative to the bond amount originally required by this Court, to demonstrate they were unable (rather than unwilling) to post the bond, and to "present alternative arrangements for the District Court's consideration that might lessen the amount of harm likely to be suffered by the Appellees in the event of an unsuccessful appeal, thereby perhaps justifying a reduction in the amount of the bond." Feb. 9 Order at 4.

In disregard of the Second Circuit's invitation, Appellants used that opportunity as a platform to reargue their position that no bond be required at all. Feb. 12 H'rg Tr. at 31:7-8. They did not propose any "alternative arrangement" to lessen the harm of a stay and/or justify a reduced bond. Appellants categorically rejected this Court's suggestion that they pledge their own distributions under the Plan as bond collateral (although they now have no compunction asking this Court to command that every other stakeholder agree to disgorge its distribution). *Id.* at 52:18-21. Finally, after admitting what they should have disclosed from the start, *i.e.*, that they were unwilling to post a bond of more than $10 million, they withdrew their request for a stay if its issuance would require a bond of more than that amount. Feb. 12 H'rg Tr. at 52:11-23. This Court immediately—and properly—vacated the stay in light of Appellants' refusal to satisfy the legal requirements to maintain it.

II. The Plan Has Been Substantially Consummated.

Once the Stay Order expired due to Appellants' failure to post the required bond, and in accordance with this Court's February 12, 2007 ruling ("because you [Appellants] no longer are asking for a stay, . . . this plan is hereby effective," *Id.* at 49:16-18), the Plan became effective, and:

- On the Effective Date, the Debtors commenced Initial Distributions under the Plan. As a result, over $6.49 billion in cash now has been distributed to in excess of 8,000 holders of Allowed Claims. The identity of at least 3,000 of such holders is not known because their distributions were made indirectly through intermediary representatives, such as trustees under various bond indentures. For example, on the Effective Date, a total of $1,809,508,577 in cash was sent to the four indenture trustees for the Subsidiary Notes for further distribution to beneficial holders.[2]
- Pursuant to the Plan, approximately 117,789,000 shares of freely tradeable TWC Class A Common Stock have been distributed to approximately 13,500 holders of Allowed Claims. The identity of at least 8,000 of such holders is not known because their distributions have been made indirectly through intermediary representatives, such

[2] The fact that the Debtors solicited votes on the Plan is irrelevant; the solicitation of votes of the thousands of beneficial holders of the 28 different series of notes issued by the Debtors was done through intermediaries, and the overwhelming majority of beneficial holders are unknown and confidential. Thus, although the Debtors are aware of the approximate number of beneficial holders of the notes as a result of the solicitation process, the Debtors do not know who the beneficial holders are nor how many of such holders have now liquidated their previous positions or transferred ownership of their bonds since the solicitation, which was done several months ago. Similarly, this multi-layered system was used to send distributions to beneficial holders (*i.e.*, distributions were made to intermediaries before being passed on to, in some cases, further intermediaries and then to beneficial holders unknown to the Debtors). Identifying and locating the thousands of beneficial holders who received distributions under the Plan would be both exceedingly difficult and impractical and, in most cases, impossible.

as trustees under various bond indentures. For example, 73,440,747 shares of TWC Stock have been distributed to Law Debenture Trust Company, as Indenture Trustee for the ACC Senior Notes, for further distribution to approximately 5,000 unknown beneficial holders of such Notes. In addition, approximately 9.6 million shares of TWC Stock have been distributed to the Government to compensate victims of the Rigas family's fraud via the victim restitution fund. Both the holders of Allowed Claims and the Government have been free since their receipt of the stock to sell, encumber or otherwise transfer ownership of any or all of the stock, as has any subsequent holder of the stock. It is impossible to recover that stock.

- Pursuant to the Plan, more than 9.56 billion freely tradable CVV Interests also have been distributed to more than 8,000 holders of Allowed Claims and more than 23,000 holders of Equity Interests. The identity of approximately 8,000 of such holders is not known because their distributions have been made indirectly through intermediary representatives, such as trustees under various bond indentures. For example, 1,790,968,271 units of CVV Series ACC-4 Interests have been sent in book-entry form to the Bank of New York, as Indenture Trustee for the ACC Subordinated Notes, for further distribution to approximately 800 unknown beneficial holders of such Notes. All holders of CVV Interests have been free to sell, encumber or otherwise transfer any or all of the CVV Interests, as has any subsequent holder of a CVV Interest, and those interests cannot be recovered.

- In addition there are multiple Classes of Claims under the Plan in which no Disputed Claims remain and all Allowed Claims have been paid as part of the Initial Distributions. Those Classes include: ACC Senior Notes Claims Class, ACC Subordinated Notes Claims Class, Arahova Notes Claims Class, FPL Note Claims Class, FrontierVision Holdco Notes Claims Class, FrontierVision Opco Notes Claims Class, and Olympus Notes Claims Class. There are also multiple Classes of Claims under the Plan for which a considerable portion of the Claims in such Class have been Allowed and paid.[3]

As a result of the foregoing, the Plan has been substantially consummated.[4]

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[3] For the ACC Trade Claims Class, approximately $279 million of the approximately $284 million in Claims that were estimated to be Allowed under the Plan (*i.e.*, 98%) have been Allowed and paid as part of the Initial Distributions. Similarly, for the Subsidiary Debtor Trade Claims Class, approximately $292 million of the approximately $301 million in Claims that were estimated to be Allowed under the Plan (*i.e.*, 97%) have been Allowed and paid as part of the Initial Distributions.

[4] The Bankruptcy Code defines substantial consummation as "(A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan." 11 U.S.C. § 1101(2).

ARGUMENT

I. The Appeal Should Be Dismissed As Moot.

"[W]hen during the pendency of an appeal, events occur that would prevent the appellate court from fashioning effective relief, the appeal should be dismissed as moot." *Official Comm. of Unsecured Creditors of LTV Aerospace & Def. Co. v. Official Comm. of Unsecured Creditors of LTV Steel Co. (In re Chateaugay Corp.)*, 988 F.2d 322, 325 (2d Cir. 1993) ("*Chateaugay I*") (citation omitted). "An appeal should also be dismissed as [equitably] moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable." *Id.* (citation omitted). This "is a pragmatic principle, grounded in the notion that, with the passage of time, after a judgment in equity and implementation of that judgment, effective relief on appeal becomes impractical, imprudent, and therefore inequitable." *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 144 (2d Cir. 2005) ("*Metromedia*") (quoting *MAC Panel Co. v. Va. Panel Co.*, 283 F.3d 622, 625 (4th Cir. 2002)). "These principles are especially pertinent in bankruptcy proceedings, where the ability to achieve finality is essential to the fashioning of effective remedies." *Chateaugay I*, 988 F.2d at 325. *See also Allstate Ins. Co. v. Hughes*, 174 B.R. 884, 888 (S.D.N.Y. 1994).

"The Second Circuit has indicated that it is appropriate to scrutinize appeals for mootness in two situations: when an unstayed order has resulted in a comprehensive change in circumstances, and when a reorganization is substantially consummated." *Allstate Ins.*, 174 B.R. at 888 (internal citations and quotations omitted). *See also*

Metromedia, 416 F.3d at 144; *Chateaugay I*, 988 F.2d at 325; *LTV Steel Co. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 952-53 (2d Cir. 1993) ("*Chateaugay II*"). In either situation—both of which are applicable here—courts presume that an appeal should be dismissed as moot. *Chateaugay I*, 988 F.2d at 325; *Kassover v. Gibson*, No. 02 Civ. 7978 (WHP), 2003 WL 21222341, at *2 (S.D.N.Y. May 27, 2003); *Allstate Ins.*, 174 B.R. at 889; *Resolution Trust Corp. v. Best Prods. Co. (In re Best Prods. Co.)*, 177 B.R. 791, 803 (S.D.N.Y. 1995).

To overcome the presumption of mootness, Appellants must demonstrate each of the following five elements:

> (a) the court can still order some effective relief; (b) such relief will not affect the re-emergence of the debtor as a revitalized corporate entity; (c) such relief will not unravel intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place and create an unmanageable or uncontrollable situation for the Bankruptcy Court; (d) the parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings; (e) the appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable order. . . if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.

Chateaugay II, 10 F.3d at 952-53 (internal quotations and citations omitted). *See also Metromedia*, 416 F.3d at 144; *Six West Retail Acquisition, Inc. v. Loews Cineplex Entm't. Corp.*, 286 B.R. 239, 245 (S.D.N.Y. 2002); *Kassover*, 2003 WL 21222341, at **2-3; *Allstate Ins. Co.*, 174 B.R. at 889. The inability to satisfy any one of

the five elements precludes rebuttal of the mootness presumption.

For the reasons below, Appellants cannot satisfy each of the *Chateaugay II* factors.

A. Appellants Failed To Pursue With Diligence All Steps Necessary To Procure A Stay Pending Appeal.

Appellants failed to pursue diligently all available means to obtain a stay of the Confirmation Order, as required by *Chateaugay II*, 10 F.3d at 952-53. On the contrary, after they invoked the specter of mootness before this Court and the Second Circuit, Appellants themselves permitted the Plan to become effective by electing not to satisfy the bond condition of the Stay Order.[5]

Refusal to post a bond, where doing so is a condition to a stay pending appeal, constitutes a "failure to seek a stay diligently." *BNP Paribas v. Nat'l Rests. Mgmt., Inc., (In re Nat'l Restaurants Mgmt. Inc.)*, 2001 U.S. Dist. LEXIS 2261, at *15 (S.D.N.Y. Mar. 7, 2001) (dismissing appeal as equitably moot where appellant sought stay but refused to post $4.5 million bond; "[t]hat failure cannot be excused by the size of the bond imposed . . . ."). In *In re Continental Airlines*, 91 F.3d 553 (3d Cir. 1996), the Third Circuit affirmed the District Court's dismissal

[5] Appellants go so far as to suggest that, because sections 363(m) and 364(e) provide statutory safe harbors for discrete transactions within a bankruptcy case (asset sales in the context of section 363 and debtor in possession financing in the context of section 364), the doctrine of equitable mootness does not even exist. Apps' Mootness Br. at 3. Suffice it to say that such a position ignores decades of applicable case law on equitable mootness and the inequity involved in, effectively, modifying only certain provisions of the Plan and ordering discrete disgorgement, as discussed below.

of an appeal from a confirmation order because appellants were unwilling to "post a bond satisfactory to the court." *Id.* at 562. Like Appellants here, the appellants in *Continental Airlines* demonstrated a probability of success on the merits but "conceded that they were not willing to post any bond," claiming to be "merely the fiduciary" for underlying bondholders. *Id.* Because the appellants refused to post a satisfactory bond, the Third Circuit found that "this factor weighs heavily in favor of the district court's declination to delve into the merits of the Trustees' appeal." *Id. See also Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 841 F.2d 92, 95 (4th Cir. 1988) (appeal equitably moot where appellant failed to post $7 million supersedeas bond and unstayed plan was substantially consummated); *Bartel v. Bar Harbor Airways, Inc.*, 196 B.R. 268, 273 (S.D.N.Y. 1996) (dismissing appeal as equitably moot where appellant "made an oral motion for a stay of the Confirmation Order pending appeal, [but] would not agree at the time to post the necessary substantial bond, and the stay was denied on the merits").[6]

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[6] Appellants' contention that *Chateaugay II* requires only that they seek a stay, not that they secure one, Apps' Mootness Br. at 13 (citing *WHBA Real Estate Ltd. P'ship v. Lafayette Hotel P'ship (In re Lafayette Hotel P'ship)*, 1997 WL 599386 (S.D.N.Y. Sept. 29, 1997)), is contrary to the Second Circuit's pronouncements. Appellants here did not pursue a stay "with diligence" as *Chateaugay II* requires (they instead engaged in a game to see if they could obtain a stay at no cost to themselves). In *Lafayette Hotel*, the court declined to dismiss as moot an appeal from a confirmation order because reversal "would not unravel intricate transactions as this is a rather simple case involving few parties, a lease, and a franchise agreement." *Id.* at *3. Judge Baer's comment on which Appellants rely was dicta, in response to the debtor's argument that failure to obtain a stay moots the appeal *per se*. *Id.* at *5.

Appellants blithely attempt to excuse their failure to satisfy the bond condition of the Stay Order by asserting that "no one in a similar position could possibly carry out their duties to their investors by risking $250 to $500 million for an economic upside that Appellees conceded was $250 million." Apps' Mootness Br. at 1 n.2. To the extent Appellants' after-the-fact explanation is accurate, it constitutes a business decision, not a legal basis for failing to satisfy the bond condition. Appellants never once offered to post a bond even in a reduced amount of $250 million (an amount that coincides with Appellants' maximum economic upside) or any other amount above $10 million. It is evident that Appellants' refusal to post a bond, resulting in the vacatur of the stay issued, has nothing to do with Appellants' supposed fiduciary restraints as "investment managers." It has everything to do with Appellants' desire to take a free appellate ride on the backs of the many stakeholders from whom Appellants wish to extract a better settlement. This is not conduct that equity rewards. Appellants' requests for a stay that they never intended to bond do not constitute diligent pursuit of all available remedies under *Chateaugay II*.

B. The Court Has No Ability To Order Effective Relief Without Unraveling The Global Settlement And The Plan And Leaving The Bankruptcy Court With An Unmanageable, Uncontrollable Situation.

Appellants cannot satisfy the first and third *Chateaugay II* factors either, because as this Court has already ruled, "once set in motion, the Plan truly cannot be unraveled. Any attempt to do so is proscribed by *Chateaugay II*, as it would, without a doubt, 'knock the props out from under the authorization for every trans-

action that has taken place and create an unmanageable, uncontrollable situation.' " Jan. 24 Op. at 24. This Court also noted that "[o]nce the distributions are made pursuant to the Plan, it will become impracticable to ever fashion effective relief to the Appellants." *Id.* at 23.

Nothing has changed since January 24th that should cause this Court to alter its conclusions. After Appellants refused to post a bond, the Plan was declared effective and has been substantially consummated. Billions of dollars in cash, TWC Stock and CVV interests have been distributed under the Plan to tens of thousands of stakeholders. As a substantial portion of those distributions was made through intermediaries, the actual identities of nearly all of the true stakeholders are not even known (and are confidential unless they consent to their disclosure). It is likely that many of the stakeholders have, in turn, since disposed of their distributions (by utilizing the cash, liquidating their stock and/or entering into myriad other transactions) in reliance on the Plan and the unstayed Confirmation Order.[7] Indeed, it is likely that a substantial portion of the distributions have already changed hands multiple times.[8] It would be manifestly

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[7] Pursuant to section 1145 of the Bankruptcy Code, the distribution under the Plan and subsequent sales of TWC Stock are exempt from registration under the securities laws. *See* 11 U.S.C. § 1145. If the Plan were undone and/or Confirmation Order reversed, would that mean that the original distribution was not exempt? That the subsequent resales were not exempt? Although Appellants claim this can be avoided through "rough justice" (*i.e.*, discrete modifications to the Plan) rather than wholesale reversal, such a result is prohibited by applicable law and would be wholly inequitable, as explained below.

[8] Prior to the Effective Date, the TWC Stock had been trading on a "when-issued" basis since early January. Following the Effective Date and until the end of February, the TWC Stock was trading on the

inequitable to try to fashion effective relief (even assuming it could be done) under such circumstances.

Appellants, however, insist that their decision not to secure a stay should not result in dismissal because the Court still possesses the ability to grant "*some* relief" (in the form of limited disgorgement). Apps' Mootness Br. at 14 (original emphasis). This argument is belied by Appellants' own request for relief on the Appeal: they do not seek limited disgorgement—they seek reversal of the Plan and Confirmation Order in their entirety. Everything that has been done since the Effective Date will have to be unraveled. And, as discussed below, there is no basis for the Court even to grant "some relief" in the form of unraveling one but not all interdependent prongs of the Global Settlement. Moreover, the question here is not whether the Court *could* grant "some relief," but whether it would be both equitable and practical to do so in light of Appellants' decision not to procure a stay. *Chateaugay II*, 10 F.3d at 952-53 (presumption of mootness remains unrebutted unless appellant "pursued with diligence all available remedies to obtain a stay of execution of the objectionable order *if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.*") (emphasis added) (citation omitted).[9]

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over-the-counter bulletin board (as have been two series of CVV Interests). In addition, the TWC Stock began trading on the New York Stock Exchange yesterday, further facilitating more active trading in the stock.

[9] Appellants contend that a failure to procure a stay "should weigh heavily against an appellant only if ... the Court finds it *impossible* to fashion some effective relief." Apps' Mootness Br. at 14 (emphasis added). That is just plain wrong. Where a court finds it impossible to fashion effective relief, the court must dismiss the appeal on *constitutional* mootness grounds. The *Chateaugay II* factors, in contrast, speak to *equitable* mootness (*i.e.*, where effective

Here, any attempt to fashion an effective remedy by forcing stakeholders to disgorge some or all of their distributions would not only be impracticable (if not impossible), it would be grossly inequitable. First, it would be impossible to obtain full disgorgement from all stakeholders to whom distributions were made (leaving aside the huge uncertainty and practical difficulties associated with identifying, obtaining jurisdiction over, suing and executing judgments against each of those thousands of creditors).[10] Appellants themselves conceded as much in seeking to persuade this Court to issue the Stay Order.[11] The disgorgement proposal necessarily would lead to a situation where similarly situated stakeholders *within the same class* would receive asymmetrical distributions. Such a result is inherently unjust, unlawful, and inequitable.[12]

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relief is possible, but would be inequitable and impracticable). Appellants' thesis writes equitable mootness right out of the law by limiting its applicability to only those circumstances where an appeal is constitutionally moot.

[10] Appellants earlier stated that "[o]nce distributions of [estate] property are made to creditors, it is at least arguably no longer subject to the court's subject matter jurisdiction" under 28 U.S.C. § 1334(e). Jan. 19 Letter at 1. Their current brief conveniently ignores that impediment.

[11] In Appellants' Jan. 15 Letter, they conceded "it is a *certainty* that some *material amount* of the distributions will not be recoverable" from distributees whose identities are not known. *Id.* at 4 (emphasis added). In their Jan. 19 Letter, Appellants again conceded that a "disgorgement remedy would *not* eliminate severe risks of mootness and equitable mootness," because "without special protections [*i.e.*, prior consent of all distributes and appropriate mechanics], disgorgement by creditors *is impracticable*, especially given that so many creditors are conduits for other beneficial holders whose identities and addresses *are unknown*." *Id.* at 2 (emphasis added).

[12] Appellants now contend that disgorgement could be implemented by going after, in the first instance, participants in the MIA

Nor can this Court grant "some relief" by ordering limited disgorgement from selective creditors such as the Arahova creditors. The Plan is based on the Global Settlement, which is an integrated settlement among many parties holding claims at all levels of the Debtors' complex capital structure. Neither this Court, nor the Bankruptcy Court on remand, can order disgorgement from only a select group of creditors, as Appellants contend. To do so would impermissibly rewrite the bargain struck by the settling parties, which bargain was accepted by all classes of creditors voting on the Plan. The Second Circuit made this clear in this very case when it dismissed as moot an appeal from a District Court order approving the settlement between the Government and the Rigases, finding that modification of the settlement agreements would deprive the Government of "the benefits of their bargains in the four interrelated settlements approved by the 9019 order at issue." *Ad Hoc Adelphia Trade Claims Comm. v. Adelphia Commc'ns Corp.*, 2006 U.S. App. LEXIS 32020 at *4-5 (2d Cir. Dec. 26, 2006) ("*Adelphia Decision*"). *See Metromedia*, 416 F.3d at 145 (dismissed appeal of release provisions in consummated plan as equitably moot because, even if the Court vacated and remanded on the merits, the transactions completed pursuant to the

litigation whose identities are "known" (such as the Ad Hoc Committee of Arahova Noteholders, the Ad Hoc Committee of FrontierVision Noteholders, the ACC Trade Committee, W.R. Huff, Tudor, Highfields, and the "Crossover" Committee). These ad hoc committees and entities, however, represent only a subset of the total population of holders in the classes of which they are members. Were a court to attempt to fashion effective relief by recouping distributions from the members of these ad hoc groups—while not also recouping comparable distributions from every other holder in their class—creditors within particular classes would be treated disparately, which is not permissible under section 1123(a)(4) of the Bankruptcy Code.

Plan could not "be undone without violence to the overall arrangements."). *See also Becker v. Warner Commc'ns, Inc. (In re Warner Commc'ns Sec. Litig.)*, 798 F.2d 35, 37 (2d Cir. 1986) ("[I]t is not a district judge's job to dictate the terms of a class settlement; he should approve or disapprove a proposed agreement as it is placed before him and should not take it upon himself to modify its terms."); *Jeff D. v. Andrus*, 899 F.2d 753, 758 (9th Cir. 1989) ("[C]ourts are not permitted to modify settlement terms or in any manner to rewrite agreements reached by parties."); *Cotton v. Hinton*, 559 F.2d 1326, 1331-32 (5th Cir. 1977) ("We are not free to delete, modify or substitute certain provisions of the settlement. The settlement must stand or fall as a whole.").[13]

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[13] Appellants' citations at pages 9-10 of their brief for the proposition that appeals are usually not dismissed as moot despite the absence of a stay where the only issue on appeal is reallocation of discrete assets are inapposite here. *Mission Iowa Wind Co. v. Enron Corp. (In re Enron Corp.)*, 291 B.R. 39 (S.D.N.Y. 2003), involved an appeal from an order approving the sale of assets owned by U.S. and foreign subsidiaries of one Enron debtor where the issue on appeal was limited to the appropriate allocation of the sale proceeds among the U.S. debtor subsidiaries and the foreign non-debtor subsidiaries. The court concluded the appeal was not moot only because approximately $84 million of the $205 million of sale proceeds allocated to the foreign non-debtors would flow upstream to the parent U.S. debtor and would be within the bankruptcy court's jurisdiction for reallocation to the U.S. debtor subsidiaries, which contended on appeal that their allocation was too low. *Id.* at 42. In *Hicks, Muse & Co. v. Brandt (In re Healthco Int'l, Inc.)*, 136 F.3d 45 (1st Cir. 1998), the court declined to dismiss an appeal from an order approving a Rule 9019 settlement of an adversary proceeding commenced by a chapter 7 trustee as moot because the only actions that had taken place to implement the settlement were the dismissal of the adversary proceeding and the payment of the settlement funds to the trustee or its employees, which funds the court found could easily be recovered.

Indeed, even if it were possible (which it is not) for this Court to limit disgorgement to those parties impacted by the Inter-Creditor Dispute (which presumably includes the disgorgement of Appellants' own distributions, although they have not offered such remedy), the so-called "rough justice" sought by Appellants would not work in any event. Try as Appellants might to make it a binary proposition, the Inter-Creditor Dispute has never been a two-party dispute between the ACC Debtor and the Arahova Debtor. Had it been, there would have been no reason for the FrontierVision, Olympus, FPL, Subsidiary Trade, or Subsidiary Other Unsecured classes of creditors to agree to $80 million, $16 million, $6.2 million, $39.2 million, and $6.8 million in respective give-ups under the Plan.

Moreover, the agreement to pay the Banks cash in the amount of their claims notwithstanding the fact that the Banks' claims are vigorously disputed reflected the fact that, among other things, such payment was necessary to effectuate the other aspects of the Global Compromise. There also would have been no reason for unsecured creditors to agree to the other elements of the Global Settlement, including the allocation and mix of consideration provided under the Plan (*i.e.*, the allocation of

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Id. at 48-49. *Choctaw Generation Ltd. P'ship v. Am. Home Assurance Co.*, 271 F.3d 403 (2d Cir. 2001), involved a simple dispute over a letter of credit that had been drawn down during the dispute. The Second Circuit concluded that the appeal was not moot because the party that had drawn down the letter of credit was a party to the appeal and could be ordered to make repayment of the drawn amount. *Id.* at 404. Last, in *In re PWS Holding Corp.*, 228 F.3d 224 (3d Cir. 2000), the Third Circuit declined to dismiss an appeal from an unstayed confirmation order as moot only because the sole relief sought by the appellant was the invalidation of certain releases in the plan, which releases the court concluded could be struck without unraveling the plan, on facts not present here. *Id.* at 236-37.

cash, TWC Stock and CVV interests) or the postpetition and post-Effective Date interest rates provided under the Plan (which in many cases were less than contractual and state law entitlements). All of these concessions are inextricably intertwined.

Indeed, were this just a two-party dispute, there would have been no reason for the many other creditors and creditor groups to opt into the Resolution Process. These parties, as well as the settling parties, recognized that the Inter-Creditor Dispute could affect and potentially reduce recoveries to a broad spectrum of creditors across the Debtors' capital structure, including at the ACC Debtor were Arahova and others to succeed in certain of their litigation positions. In short, to order disgorgement from only one group of creditors would so upset the delicate balance that it would "knock the props" out from the settlement and the Plan—you simply cannot start pulling the string without the entirety of the whole becoming unraveled. That type of "blue penciling" is an impermissible modification under binding Second Circuit authority.[14]

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[14] Appellants' attempt to make disgorgement a binary proposition between holders of ACC Senior and Arahova notes would deprive each of those groups of its right (relinquished as part of the Global Settlement) to recoup any losses either might sustain in litigation with the other by prosecuting claims against *other* debtors and stakeholders. For example, even if the Arahova Noteholders Committee were to "lose" in a resumed MIA litigation with the ACC Senior Noteholders (a result that is anything but a foregone conclusion), but for its participation in the Global Settlement and support for the Plan, it could have sought to offset its "loss" by prosecuting claims that the Arahova Debtors have against other Debtors, such as FrontierVision or Olympus. As each succeeding affected stakeholder group is put at risk of disgorgement, it would have the legitimate right to recoup the disgorgement by resuscitating claims against other Debtors (whether or not related to the MIA) that it had agreed to

Appellants also baldly assert that, "[a]s a practical matter," it would be easy to order disgorgement from other unsecured creditors because the Plan already contains appropriate mechanisms providing for the potential disgorgement of distributions to holders of over $5 billion in Bank Claims. Apps' Mootness Br. at 8. This specious argument is completely off base for two reasons. First, it entirely ignores that the Bank disgorgement provisions of the Plan *are existing Plan provisions* that were adequately described in court approved disclosure materials and overwhelmingly accepted by all classes of Bank Claims. Thus, those provisions were part and parcel of *existing* Plan treatment proposed and accepted by the affected creditors. No other holders of claims under the Plan were solicited or voted on that basis.

Second, the Plan provisions providing for holders of Bank Claims to disgorge distributions to them in the event they were to lose a discrete litigation pending against them were the subject of extensive negotiation and agreement of the parties and contain significant undertakings by the holders of Bank Claims designed to make disgorgement an effective remedy. In particular, Section 5.2(c)(v) of the Plan required the holder of a Bank Claim to agree to significant undertakings to even receive a distribution, including delivering evidence of its ability to disgorge any distribution received (which required, generally, that a holder either (a) be a federally chartered bank or, (b) if not, then an entity with a net worth of at least 5 times its distribution, that agrees to not make a liquidating distribution unless it establishes

relinquish as part of the Global Settlement. There would be no principled way to compel a disgorging stakeholder to remain bound to the remnants of the Global Settlement. Step by step, the settlement would unwind.

an appropriate reserve demonstrating ability to disgorge, and consents to the jurisdiction of the Bankruptcy Court to enforce such undertaking). None of these protections exists with respect to the unsecured creditors, who have already received their distributions.

Appellants proceed from the misguided assumption that disgorgement requires little more than putting affected stakeholders on notice. *See* Apps' Mootness Br. at 8 (suggesting that disgorgement "will require postage or email, not rocket science.") Notably missing, however, is any discussion of how disgorgement would actually be implemented. Appellants' proposal raises a plethora of unanswered questions including (just to name a few):

- How would a court obtain jurisdiction over the disgorging party and/or the property?
- How would disgorgement be enforced against parties who refuse to disgorge?
- What happens if the disgorging party is no longer credit worthy or is judgment proof?
- How would a court deal with the inherent inequities that arise if disgorgement could not be obtained from all of the affected parties?
- To whom should disgorgement be made? How much should be disgorged and when, and how will the bankruptcy estate be managed and funded during the period when creditor recoveries are further litigated?
- Could a court fairly deal with the issue of disgorging the "equivalent value" of a stock distri-

> bution when the parties are likely to have disposed of the stock at different prices?[15]

For all these reasons, disgorgement is neither an equitable nor practical remedy here. Courts repeatedly reject disgorgement as a means to salvage an otherwise equitably moot appeal. As Judge Easterbrook of the Seventh Circuit stated:

> UNR's employees sought a stay at every opportunity; by doing so, they insist, they preserved their entitlement to full appellate review. Perhaps so, if failure to seek a stay were a censurable event to be punished by refusal to adjudicate the merits. Yet requesting a stay is not a mandatory step comparable to filing a timely notice of appeal. The significance of an application for a stay lies in the opportunity it affords to hold things in stasis, to prevent reliance on the plan of reorganization while the appeal proceeds. A stay not sought, and a stay sought and denied, lead equally to the implemen-

[15] Other issues abound. What if the resolution of some of the MIA issues impacts tax positions taken or required to be taken by the now-liquidated Debtors? Further, Adelphia's tax treatment upon any disgorgement by creditors is unclear, particularly if the disgorgement occurs prior in time to a re-distribution to other creditors. Under the well-settled claim of right doctrine announced by the United States Supreme Court in *North American Oil Consolidated v. Burnet*, 286 U.S. 417 (1932), cash payments received are currently included in the recipient's income even if liabilities exist that will give rise to future payment obligations. If this doctrine were applicable in the present situation, Adelphia could be faced with significant unexpected tax liabilities. Furthermore, few, if any, of the witnesses expected to testify in the MIA remain in the Debtors' employ. Can such witnesses be compelled to testify? Who will compensate them for their time? Who will represent them? Who will pay for such counsel? The Global Settlement obviated the need to address any of these issues.

> tation of the plan of reorganization. And it is the reliance interests engendered by the plan, coupled with the difficulty of reversing the critical transactions, that counsels against attempts to unwind things on appeal.

In re UNR Indus., 20 F.3d 766, 769-770 (7th Cir. 1994). It is therefore not surprising that Appellants told this Court, "We are unaware of any large chapter 11 case where a court denied a stay pending appeal in favor of the plan distributions being disgorged." Jan. 15 Letter at 4.[16]

C. Innocent Third Parties And Non-Parties To The Appeal Would Be Adversely Affected By Any Attempt To Fashion Effective Relief.

The fourth *Chateaugay II* factor requires Appellants to demonstrate that each of the parties who would be adversely affected by the relief proposed by Appellants

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[16] Numerous courts have reached the same conclusion. *See, e.g., In re Ionosphere Clubs, Inc.*, 184 B.R. 648, 652 (S.D.N.Y. 1995) ("Since the confirmation of the Plan, tens of thousands of creditors have received millions of dollars in distributions under the Plan. These assets and distributions cannot be recouped."); *In re Best Prods. Co.*, 177 B.R. at 805 ("It is not now possible to reverse the multitude of transactions executed pursuant to the Plan and in reliance on the existence of reorganized Debtors."); *Bartel*, 196 B.R. at 273 ("In this case, Bar Harbor's assets have been liquidated, millions of dollars in distributions have already been made, and these assets and distributions cannot be recouped."); *In re Texaco Inc.*, 92 B.R. 38, 45 (S.D.N.Y. 1988) ("[I]t is not hard to imagine that hundreds or even thousands of good-faith transactions by innocent parties may be undertaken in reliance [on the un-stayed confirmation order] . . . . Under such circumstances it would be manifestly unjust to reverse on appeal, thereby knocking the props out from under the authorization for every transaction that has taken place.") (internal quotations and citations omitted).

has notice of the appeal and an opportunity to participate in the proceedings. Appellants cannot meet their burden with respect to this factor. Appellants contend that all interested parties have been given notice of the possibility of disgorgement as a result of Appellants' service of their notice of appeal on all creditors and interest holders who had requested notice of filings on the Bankruptcy Court's docket and because, after the Court allowed the Plan to go effective, "the wire services ran stories that notified all creditors that their distributions may be subject to disgorgement." Apps' Mootness Br. at 11-12. Appellants' contention is singularly unpersuasive and should be rejected.

Appellants mistakenly contend that they have made holders of ACC and Arahova notes parties to the Appeal simply because they "named" them as appellees in the notice of appeal. Appellants' appeal arises from the Bankruptcy Court's denial of their objections to the Plan. Only Appellants and the Proponents—and *not* the ACC and Arahova noteholders—were parties to those contested matters. Moreover, holders of ACC and Arahova notes that voted to accept the plan are not aggrieved by the Confirmation Order and, therefore, could not have appealed from it themselves. *Int'l Trade Admin. v. Renssalaer Polytechnic Inst.*, 936 F.2d 744, 747 (2d Cir. 1991). Appellants cite no authority for the proposition that a party can convert a non-party to a motion into a party to an appeal by the unilateral act of naming it as an appellee in the notice of appeal.

Even if the notice of appeal were meaingful as to its recipients,[17] it hardly put any of them "on notice" of a risk of disorgement. Indeed, Appellants speciifically

[17] Those recipients were, in any event, just a small subset of the universe of Adelphia creditors who received distributions.

requested that the Bankruptcy Court, this Court (twice), and the Second Circuit provide judicial notice to all creditors of a disgorgement risk and each court refused. And the unstayed Conformation Order itself plainly provided that creditors could keep what they received (¶ 57). Thus, anyone monitoring these proceedings was hardly "on notice" of any disgorgement risk. Mr. Bienenstock's interview with a wire service, in which he advocated his clients' unsucessful position, does not cure the absence of notice.[18]

Finally, and critically, substantial consummation of the Plan was relied upon by Time Warner Cable ("TWC") for the fulfillment of one of Adelphia's key contractual commitments to TWC—the creation of a public market for TWC Stock through the issuance of such stock pursuant to the "1145 exemption" applicable to confirmed plans.[19] Reversal of the Confirmation Order calls into question the registration exemption upon which TWC legitimately relied as part of the Court-approved arrangement with Debtors. Similarly, substantial consummation enabled Adelphia to fulfill its contractual commitments to establish the Government Restitution Fund. *See In re Continental*, 91 F.3d at 562 ("High on the list of prudential considerations taken into account by courts considering whether to allow an appeal fol-

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[18] Even assuming, *arguendo*, that all parties in interest had received adequate notice, not all of them are parties to the Appeal and, importantly, it would be impracticable for all of them to participate in the Appeal. *Allstate Insurance Company v. Hughes*, 174 B.R. 884, 890 (S.D.N.Y. 1994) (finding appeal from unstayed order in an ancillary bankruptcy proceeding moot because, among other reasons, it would be impracticable to have all creditors adversely affected by modification of the order participate in the appeal).

[19] As the Court knows, the failure of such exemption would have resulted in a contractual obligation to conduct an IPO.

lowing a consummated reorganization is the reliance by third parties, in particular investors, on the finality of the transaction.").

The Second Circuit has already held *in this case* that appellate relief cannot be granted that frustrates TWC's and the Government's legitimate contractual rights. In dismissing, as moot, an appeal of the Government Settlement, the Court noted that "the transfer and subsequent sale of the RME's [to TWC . . .] created comprehensively changed circumstances." Adelphia Decision at 3. That logic applies here with equal force.

II. Appellants Are Judicially Estopped From Claiming That This Court Could Fashion Effective Relief.

Appellants are judicially estopped from denying that the appeal is equitably moot. "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . ." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). Judicial estoppel "protects the essential integrity of the judicial process" and "prevents parties from playing 'fast and loose' with the courts." *Id.* at 750 (citations and quotations omitted). "Because the rule is intended to prevent improper use of judicial machinery, judicial estoppel is an equitable doctrine invoked by the a court at its discretion." *Id.* Judicial estoppel arises when "(1) the party against whom the estoppel is asserted took an inconsistent position in a prior proceeding and (2) that position was adopted by the first tribunal in some manner." *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 6 (2d Cir. 1999). Both elements of judicial estoppel are satisfied here.

Appellants' demand for a stay was clearly predicated on their position that, absent a stay, any appeal would be moot. Appellants' current position is completely at odds with their previous position, satisfying the first element of judicial estoppel. The second element of judicial estoppel was satisfied when this Court granted a stay pending appeal subject to satisfaction of the bond condition. The Court clearly adopted Appellants' position that without a stay, Plan consummation would deprive Appellants of the right to an appeal by virtue of equitable mootness. On January 16, 2007, the Court characterized the Appellants' position as follows:

> As I read your papers, and as I read your answer to the question posed over the weekend [in the January 15 Letter to Chambers], I think you concede that the irreparable harm would be the loss of any opportunity to have full appellate review of serious questions . . . because, this is such a complex bankruptcy that if the distribution occurs, it could never be unraveled. And there really would be a powerful mootness argument. And so I think you're saying, that's our irreparable harm.

Jan. 16 Conf. Tr. at 12:11-20. The Court relied on this position in finding the existence of irreparable harm, holding that "it is overwhelmingly likely . . . that any appeal of the Confirmation Order after implementation of the Plan would be dismissed as moot. Thus, Appellants have made a showing that they will suffer irreparable harm in the absence of a stay." January 24 Opinion at 25. Thus, the second element of judicial estoppel is satisfied, and Appellants are estopped from denying that this Appeal is moot.

Last, the Proponents would be remiss were they not to address Appellants' plea that this Court ignore Second

Circuit precedent, requiring dismissal of the Appeal as equitably moot, because of an asserted urgent need to correct the purported errors committed by the court below, lest the Southern District of New York lose its stature as a premiere venue for the nation's largest chapter 11 cases. Appellants consistently have demonstrated that their goal is to extract more money. Any suggestion that they are in some way seeking to protect some greater interest is simply absurd. As the Proponents demonstrated in their brief on the merits, nothing could be further from the truth. The Proponents are confident that, were this Court to reach the merits of the Appeal, it would conclude that its preliminary findings and conclusions were based upon Appellants' misstatements of fact and law and that, upon plenary review, it would affirm the Confirmation Order in all respects.

CONCLUSION

For all of the foregoing reasons, the Appeal should be dismissed as equitably moot.

Dated: New York, New York
March 2, 2007

Respectfully submitted,

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06-1417-bk(L)

06-1738-bk(CON)

To Be Argued By:
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 06-1417-bk (L), 06-1738-bk (CON)

IN RE: ADELPHIA COMMUNICATIONS CORPORATION,

Debtor.

AD HOC ADELPHIA TRADE CLAIMS COMMITTEE,
OFFICIAL COMMITTEE OF UNSECURED CREDITORS,
W.R. HUFF ASSET MANAGEMENT CO., LLC,
U.S. BANK NATIONAL ASSOCIATION AS INDENTURE TRUSTEE,

Appellants-Cross-Appellees,

(*caption continued on inside front cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DISMISSAL OR AFFIRMANCE

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Of Counsel.

—v.—

ADELPHIA COMMUNICATIONS CORPORATION,

Debtor-Appellee,

BANK OF AMERICA, N.A., BANK OF MONTREAL, WACHOVIA BANK, NATIONAL ASSOCIATION,

Appellees,

OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS,

Appellee-Cross-Appellant.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 06-1417-bk(L), 06-1738-bk(CON)

IN RE: ADELPHIA COMMUNICATIONS CORPORATION,

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Appellants-Cross-Appellees,

-v.-

ADELPHIA COMMUNICATIONS CORPORATION,

Debtor-Appellee,

BANK OF AMERICA, N.A., BANK OF MONTREAL, WACHOVIA BANK, NATIONAL ASSOCIATION,

Appellees,

OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS,

Appellee-Cross-Appellant,

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The United States Department of Justice (the "Government") respectfully submits this brief as *amicus curiae* pursuant to Federal Rule of Appellate Procedure 29(a) and this Court's Order of November 13, 2006, inviting the Government and the Securities and Exchange Commission ("SEC") to file *amicus curiae* briefs "addressing the issue of whether any form of relief granted to the appellants-cross-appellees could preclude the need on remand for reformation or rescission of the settlement agreements affirmed by the 9019 Order now before us."* The appellants-cross-appellees (the "Appellants"), various unsecured creditors who have filed claims as to the bankruptcy estate of Adelphia Communications Corp. ("Adelphia"), have appealed an order entered February 24, 2006, in the United States District Court for the Southern District of New York (Kaplan, J.), which affirmed the May 26, 2005 order of the United States Bankruptcy Court for the Southern District of New York (Gerber, J.), which, in

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* At the time that the Government received this Court's November 13, 2006 Order, the Government had been seeking leave from the Solicitor General to file a Statement of Interest in this appeal pursuant to 28 U.S.C. § 517, largely to respond to arguments raised by the Appellants regarding the Government's position as to this appeal. The arguments that the Government intended to make in its Statement of Interest are reflected in this brief.

turn, approved three settlement agreements pursuant to Federal Rule of Bankruptcy Procedure 9019.

In the Government's view, there is simply no form of relief that could be granted to the Appellants by this Court that would avoid the need on remand for reformation or rescission of the complex, interrelated agreements that are the subject of Judge Gerber's 9019 Order. The relief that the Appellants' seek—a remand with instructions that the $715 million be distributed according to the bankruptcy rules—would create havoc by effectively unwinding the complicated fabric of these agreements which has been approved by two district court judges and relied upon by parties not even involved in this appeal. Indeed, the agreements were central to the sentencing proceedings of John Rigas and Timothy Rigas, both of whom were not ordered to pay restitution by the Honorable Leonard B. Sand as a result of their participation in these agreements. Moreover, vacating the bankruptcy court's order would also deprive the Government of $715 million to which it has superior title under the relation-back doctrine codified in 21 U.S.C. § 853(c), and it would vitiate the Attorney General's exclusive statutory authority to remit forfeited property to victims, pursuant to 21 U.S.C. § 853(i). Accordingly, this Court should dismiss this appeal as moot or affirm Judge Kaplan's order, as the Appellees have requested.

Statement of Facts*

A. The Adelphia Fraud

John Rigas was the founder, Chairman of the Board of Directors and Chief Executive Officer of Adelphia from 1986 through May 2002. (A. 16)**. Timothy Rigas was the

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* The Government sets forth herein only those facts relevant to this *amicus curiae* brief. For a full statement of the facts underlying this appeal, the Court is respectfully referred to the Joint Brief of Appellees and Cross-Appellants, filed on August 7, 2006.

** "Appellants' Br." refers to the Joint Brief of Appellants-Cross-Appellees, filed on July 6, 2006; "Adelphia Br." refers to the Joint Brief of Appellees and Cross-Appellant, filed on August 7, 2006; "Adelphia Motion to Dismiss" refers to Appellees' Motion to Dismiss Appeal, filed on August 7, 2006; "Appellants' Opposition to Motion to Dismiss" refers to the Appellants' Opposition to the Appellees' Motion to Dismiss, filed on September 6, 2006; "Adelphia Reply Motion to Dismiss" refers to the Appellees' Reply Brief in Further Support of Motion to Dismiss Appeal, filed on September 20, 2006; "Abrams Aff." refers to the Affidavit of Marc R. Abrams, Esq. in Support of Appellees' Motion to Dismiss Appeal, filed on August 7, 2006; "A." refers to the Joint Appendix, filed on July 6, 2006; "SPA." refers to the Special Appendix, filed on July 6, 2006; "GA" refers to the Government's Appendix, filed today by the Government; and "Ward Decl." refers to the Declaration of Barbara A. Ward, also filed today by the Government.

Chief Financial Officer and Treasurer of Adelphia from the 1990s up to and including May 2002. (A. 16). In addition to controlling Adelphia, a public company, John Rigas, Timothy Rigas, and other members of the Rigas family privately owned a number of cable systems that were managed by Adelphia ("the Rigas Managed Entities" or the "RMEs"*). (SPA. 10).

In March 2002, Adelphia—then the sixth largest cable television service provider in the United States—publicly announced that it was liable for approximately $2.2 billion in off-balance sheet liabilities that had not previously been disclosed in its financial statements. (A. 12, 15; SPA. 10). Those liabilities arose from certain so-called "co-borrowing" arrangements, pursuant to which Adelphia was jointly and severally liable for more than $2.2 billion borrowed by the RMEs. (A. 15). As a result of these and subsequent disclosures of self-dealing by the Rigas family and others, the market price of Adelphia stock plummeted. On March 27, 2002, Adelphia's stock price fell by nearly 25 percent, and it continued falling steadily thereafter. In May 2002, Adelphia stock was delisted, and members of the Rigas family had relinquished their management positions. (A. 12, 15). On June 25, 2002, faced with pending investigations by the United States Attorney's Office for the Southern District of New York (the "Office") and the SEC, mounting litigation, default notifications, no access to traditional sources of liquidity, and the risk of collection and foreclosure by creditors, Adelphia filed for bankruptcy

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* The RMEs also have been referred to as "the Forfeited Managed Entities" or "FMEs" in this litigation.

protection under Chapter 11 of the Bankruptcy Code. (A. 16; SPA. 11).

B. The Criminal Prosecution Of The Rigases*

On September 23, 2002, a grand jury in the Southern District of New York returned Indictment 02 Cr. 1236 (LBS); Superseding Indictment S1 02 Cr. 1236 (LBS) was returned on July 30, 2003. The Superseding Indictment alleged that the defendants hid $2.3 billion in debt, deceived investors, and stole company cash for their own benefit. The Superseding Indictment charged John J. Rigas, Timothy J. Rigas, Michael J. Rigas, and Michael C. Mulcahey in twenty-three counts with conspiracy to commit securities and wire fraud, to submit false filings to the SEC, to create false business records, and to commit bank fraud; securities fraud; wire fraud; and bank fraud, all relating to events and transactions involving Adelphia and various of the RMEs. The Superseding Indictment also included a forfeiture allegation that sought the forfeiture, to the United States, pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461, of all property, real and personal, that constituted or was derived from proceeds traceable to the commission of the charged offenses, including a money judgment in the amount of $2.5 billion.

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* For a full statement of the facts relating to the criminal prosecution, including the offense conduct, the Government respectfully refers the Court to its brief in the pending appeal by John and Timothy Rigas of their convictions. *See United States* v. *John Rigas and Timothy Rigas*, Docket Nos. 05-3577(L), 05-3589 (CON), *appeal argued* June 14, 2006.

On February 23, 2004, the trial began before the Honorable Leonard B. Sand, United States District Judge for the Southern District of New York, and a jury. The evidence at that trial overwhelmingly demonstrated that the defendants systematically looted Adelphia's assets, for the benefit of themselves and other members of the Rigas Family,* and deceived investors for years about material facts concerning Adelphia's operations and finances. The evidence further established that the RMEs were purchased and/or upgraded with funds wrongfully taken from Adelphia. Moreover, the RMEs were so highly leveraged that they did not generate enough cash to pay their own operating expenses and interest charges, and they were thus effectively subsidized by cash advances from Adelphia, whose cash was intentionally and systematically commingled with cash from the RMEs. The evidence also demonstrated that the Rigas Family had not in fact paid cash for all of the Adelphia securities they had purportedly purchased between 1998 and 2002.

Notwithstanding the dire financial straits of Adelphia and the RMEs throughout the period of the conspiracy and before, the defendants looted Adelphia's cash management system to fund all manner of personal expenses, including approximately $200 million to pay off Rigas Family margin loans; $59.4 million for open market purchases of

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* The "Rigas Family" includes John J. Rigas and his children, Michael J. Rigas, Timothy J. Rigas, James P. Rigas, and Ellen K. Rigas. These members of the Rigas Family jointly filed SEC Schedule 13Ds relating to their ownership of Adelphia stock as a "limited purpose group."

Adelphia stock by Highland Holdings, an RME; $51.1 million in cash transferred to John and Doris Rigas through Highland Holdings; $3.2 million for the production of Ellen Rigas's film "Songcatcher"; $700,000 for Tim Rigas's "founding member fee" at Briar's Creek Golf Club; and $1.5 million for improvements, furnishings, and taxes for two luxury condominiums in Beaver Creek, Colorado.

Trial concluded on July 8, 2004, when the jury convicted John Rigas and Timothy Rigas of the conspiracy charge in Count One, all of the securities fraud charges, and all of the bank fraud charges.* *See United States* v. *Rigas*, No. S1 02 Cr.1236 (LBS), 2004 WL 2434965, at *1 (S.D.N.Y. Nov. 1, 2004) (denying motion of Michael J. Rigas for judgment of acquittal); *United States* v. *Rigas*, No. S1 02 Cr.1236 (LBS), 2004 WL 2601084, at *1 (S.D.N.Y. Nov. 15, 2004) (denying motion of John and Timothy Rigas for judgment of acquittal).

On June 20, 2005, Judge Sand sentenced John Rigas to fifteen years' imprisonment, six months' supervised

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* Michael Mulcahey was acquitted of all charges. All of the defendants were acquitted of the wire fraud charges. The jury acquitted Michael J. Rigas of wire fraud and of conspiracy, and failed to reach a verdict on the securities fraud or bank fraud charges against him. On November 23, 2005, Michael Rigas pleaded guilty before the Honorable Jed S. Rakoff to a one-count Superseding Information, S2 02 Cr. 1236 (JSR), charging him with making a false entry in the books and records of Adelphia in violation of 47 U.S.C. § 220(e).

release, and an $1,800 special assessment. The same day, Judge Sand sentenced Timothy Rigas to twenty years' imprisonment, two years' supervised release, and an $1,800 special assessment. In consideration of the settlement—which is described below—between the Government and the Rigas Family, the court did not order the defendants to make restitution, or to pay a fine. (A. 1069-73). The defendants' appeal from their convictions was argued on June 14, 2006 and is *sub judice*. *See United States* v. *Rigas*, Dkt. Nos. 05-3577-cr (L), 05-3589-cr (CON).

C. The SEC Enforcement Action

On July 24, 2002, the SEC filed an action against Adelphia and other defendants alleging that from 1998 through March 2002, at the direction of its senior management, the company fraudulently and systematically excluded $2.3 billion in liabilities from its consolidated financial statements by hiding them on the books of off-balance sheet affiliates. *See Securities and Exchange Commission* v. *Adelphia Communications Corp.*, No. 02 Civ. 5776 (PKC) (S.D.N.Y.); (A. 19). The SEC also alleged that Adelphia inflated earnings to meet Wall Street's expectations and concealed self-dealing by members of the Rigas family. Because during the period of the fraud, Adelphia raised equity and debt financing, the SEC sought disgorgement of these funds. The SEC action was stayed pending the resolution of the criminal proceeding. (A. 19).

D. The Settlement Agreements

On December 10, 2004, following the convictions of John and Timothy Rigas, the Government filed an Application for a Preliminary Order of Forfeiture against them, pursuant to Federal Rule of Criminal Procedure 32.2, seeking the imposition of a money judgment in the amount of $2.5 billion. With the Government's consent, the defendants' sought, and received, repeated adjournments of their time to respond to the Government's application and of the sentencing date, to permit the parties to discuss a potential resolution of the Government's forfeiture claims. (A. 1071).

In addition to the pending forfeiture and SEC proceedings, several other proceedings and investigations were proceeding simultaneously. Among other things, Adelphia had brought an adversary proceeding in bankruptcy court against members of the Rigas family and several RMEs to recover money allegedly looted from Adelphia (A. 20); Adelphia's creditors had filed lawsuits; and the Government was considering whether to bring criminal charges against Adelphia (A. 18). Had Adelphia been indicted and convicted, the Government would then seek orders of criminal forfeiture and restitution, as required by statute.

On or about April 25, 2005, following months of negotiations, five interrelated agreements were entered into which provided for a global resolution of claims among the Government, the SEC, Adelphia, and John, Timothy, Michael, James, Mary Ann and Doris Rigas, Ellen Rigas Venetis, and their affiliated entities (the "Rigas Parties"): (i) an agreement between the Government and the Rigas Parties (the "USAO-Rigas Agree-

ment") (A. 129-62); (ii) a Nonprosecution Agreement between the Government and Adelphia (the "NPA") (A. 57-73); (iii) an agreement between Adelphia and the Rigas Parties (the "Adelphia-Rigas Agreement") (A. 86-127); (iv) an agreement between the SEC and Adelphia (A. 75-84); and (v) an agreement between the SEC and John, Timothy, Michael, and James Rigas (Ward Decl. ¶ 4). The terms of these five agreements are interlocking and simply cannot be understood, made effective, and enforced without reference to each other. In particular, the two agreements to which the Government is a party—the NPA and USAO-Rigas—are each at stake in this appeal.

1. The USAO-Rigas Agreement

The USAO-Rigas Agreement removed several significant roadblocks from the Government's pursuit of a meaningful recovery for fraud victims. (A. 129-62). The principal assets of John and Timothy Rigas included real estate, Adelphia securities, and the RMEs, but their aggregate value would not cover the full amount of a money judgment or restitution order against the Rigases. For example, the majority of the Adelphia securities were largely worthless as a result of Adelphia's bankruptcy. Moreover, John and Timothy Rigas held only a 40 percent interest in the securities and the RMEs, with the remaining 60 percent interest held by James Rigas, Michael Rigas, Mary Ellen Rigas, Doris Rigas, and Ellen Rigas Venetis, none of whom had been convicted of criminal conduct relating to Adelphia. Accordingly, this ownership structure would have complicated any attempt to enforce *in personam* judgments against John and Timothy Rigas as to the RMEs. Moreover, the initiation of civil forfeiture

proceedings against the assets would have been time-consuming. In addition, the RMEs were subject to competing claims, including the security interests held by the lenders in the co-borrowing arrangements and Adelphia's constructive trust claim brought in its adversary proceedings against the Rigas Family, which could have further frustrated any criminal restitution order. For example, in the event of a judgment of restitution, by operation of 18 U.S.C. § 3613(c) a lien would arise in favor of the Government against the 40 percent interest held by John Rigas and Timothy Rigas in the managed entities. However, because that lien would not arise until entry of the judgment of restitution, *see id.*, that lien may have been subordinate to the banks' pre-existing security interests. Because the value of the RMEs (estimated at over $900 million) fell far short of the more than $2.5 billion in co-borrowing debt carried on their books (*see* Government Exhibit ("GX")* 101), victims would receive no real recovery on those assets as a result of a criminal order of restitution.**

The principal terms of the USAO-Rigas Agreement required the Rigas Parties—including the uncharged members of the Rigas family—to forfeit all of their

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* "GX" refers to a Government exhibit introduced at the criminal trial of *United States* v. *John Rigas, et al.*, 02 Cr. 1236 (LBS).

** As described more fully below, by forfeiting the RMEs, however, the Government's title "relates back" and the banks have the burden of proving that they were innocent owners.

interests in their Adelphia securities, substantially all real estate acquired during the period of the charged conspiracy, and fourteen of the sixteen RMEs. (A. 131-32, 149, 153-59).* The Agreement was intended to be a full and final settlement. (A. 137). The parties agreed that, in the event of a reversal of the convictions of John or Timothy Rigas, the Office could file a subsequent civil forfeiture action against the forfeited property and achieve the identical result. (A. 131-33; Ward Decl. ¶ 4).

From the proceeds of the assets forfeited by the Rigas Family pursuant to the Agreement, the Office, subject to approval by the Department of Justice, agreed to "establish a fund (the 'Victim Fund') for the purpose of providing restitution to such holders of Adelphia's publicly traded securities as the Government, in its sole discretion, determines were victims of the conduct alleged in the Indictment and the complaint filed in the SEC Action." (A. 135). The Office further agreed (i) to require that victims who elected to receive a distribution from the fund grant releases to the Rigas Parties (other than John and Timothy Rigas); and (ii) not to seek any further forfeiture order, a fine, or an order of restitution as part of John or Timothy Rigas's sentence. (A. 135-36).

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* The USAO-Rigas Agreement permitted the Rigas Parties to retain two of the RMEs which serve only about 5,000 of the 220,000 total cable subscribers covered by the RMEs. (A. 134 (providing that Rigas Parties retain all previously owned assets that were not forfeited pursuant to the USAO-Rigas Agreement)).

2. The NPA

Under the terms of the NPA (also referred to as the "DOJ/Adelphia Agreement" by Adelphia and the Appellants), the Office agreed not to criminally prosecute Adelphia for defrauding the holders of its securities, provided that Adelphia continued to cooperate with the Government and satisfied other conditions. (A. 57-73). The following provisions of the NPA are at the crux of this appeal:

> (2) Adelphia shall provide restitution in the amount of $715 million to ACC [Adelphia] security-holders who were victims of the fraud schemes. Payment shall be made to a fund, established by the Government, which will disburse restitution to victims in such forms and amounts as determined by this Office and the SEC, in their sole discretion, subject to any applicable court approval process. This Office and the SEC will provide Adelphia with a reasonable opportunity to present any views concerning the fund before final distribution decisions are made. . . .
>
> (3) Adelphia's payment obligations under paragraph (2), above, shall be contingent upon the Government obtaining, and then conveying to Adelphia, or its designee, full and clear title, free and clear of all liens,

> claims, encumbrances or adverse interests, to: (a) all capital stock, partnership, and/or other interests in the Rigas Managed Entities; (b) the assets listed on that portion of Exhibit E to this Agreement entitled "Property To Be Forfeited and Transferred to Adelphia;" (c) and, at Adelphia's option, the securities listed on Exhibit F. Such transfer shall be effectuated as soon as reasonably practicable after the entry of a final order of forfeiture as to such properties, but in no event later than confirmation of a plan of reorganization.

(A. 59-60). In short, the Government agreed to obtain clear title to the RMEs, Adelphia securities, and certain real estate owned by the Rigas Parties and to convey those assets in turn to Adelphia, in exchange for Adelphia's payment of $715 million to a Government-established fund which would provide restitution to victims in such forms and amounts as determined by the Office and the SEC—that is, the "Victim Fund" described in the USAO-Rigas Agreement.

3. The SEC-Adelphia and SEC-Rigas Agreements

The SEC-Adelphia settlement resulted in a final judgment on consent in which (i) Adelphia was permanently enjoined from future violations of the federal securities laws (A. 75-76, 80-82); and (ii) the SEC agreed

not to seek payment of disgorgement or a penalty by Adelphia, conditioned upon Adelphia's payment of $715 million to the Government in accordance with the terms of the NPA (A. 76, 83). Likewise, the SEC-Rigas settlements resulted in final judgments in which (i) the defendants were permanently enjoined from future violations of the securities laws, and were barred permanently from accepting positions as officer and directors; and (ii) the SEC agreed not to seek payment of disgorgement or a penalty, based upon the agreement of the defendants, and other Rigas family members, to the forfeiture of assets as set forth in the USAO-Rigas agreement. The two SEC settlement agreements were approved by United States District Judge P. Kevin Castel on May 26, 2005.

E. Judge Sand's Decision To Forego Mandatory Restitution In Light Of The Victim Fund To Be Established Under The USAO-Rigas Agreement And The NPA

On April 25 and 26, 2005, the Government made a series of applications to Judge Sand relating to the USAO-Rigas Agreement and the NPA. First, the Government sought Judge Sand's approval of the USAO-Rigas agreement (which also attached the related NPA). Second, the Government submitted an affirmation and proposed order relating to victim notification procedures in connection with the sentencing of John and Timothy Rigas under the Crime Victims' Rights Act of 2004, codified at 18 U.S.C. § 3771. In particular, the Government sought Judge Sand's authorization not to make individual notice to the thousands of potential victims of the fraud, but instead proposed an alternative procedure. Since a comprehensive

effort to provide individualized notice could take many months, and unreasonably prolong the sentencing process, the Government asked the Court to find that the imposition of mandatory restitution was not required by statute* because it would unduly complicate and delay the sentencing process, and that the interests of justice in compensating the fraud victims would be best served through the criminal forfeiture process and the Victim Fund provided for in the USAO-Rigas Agreement. In this respect, the Government noted that under the USAO-Rigas Agreement, the Rigas Parties forfeited more than $1 billion in Rigas Family assets which, through the operation of the

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* The right of crime victims to mandatory restitution is limited by 18 U.S.C. § 3663A(c)(3), which provides that mandatory restitution:

> shall not apply in the case of an offense [against property, involving fraud or deceit] if the court finds, from facts on the record, that—
>
> (A) the number of identifiable victims is so large as to make restitution impracticable; or
>
> (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

18 U.S.C. § 3663A(c)(3).

NPA, would then be turned over to Adelphia in exchange for the $715 million to be used to compensate defrauded investors via the Victim Fund.

On April 27, 2005, Judge Sand issued an order prescribing the victim notice procedures to be followed by the Government, directed victims to file any objections in writing by May 10, 2005, and scheduled a hearing on any objections. Objections were filed by, among others, W.R. Huff Asset Management Co., LLC, one of the Appellants in this matter ("Huff"), and certain plaintiffs to a class action lawsuit against Adelphia and the Rigases. These petitioners specifically objected to, among other things, the connected provisions in the USAO-Rigas Agreement and the NPA that (i) allowed Adelphia to obtain title to the RMEs in exchange for a sum of money less than their estimated value of $1 billion, and (ii) stipulated that Adelphia's payment for the RMEs would be deposited into the Victim Fund for distribution to defrauded investors. At the hearing on May 18, 2005, after reviewing the submissions by Huff and others and hearing oral argument, Judge Sand overruled their objections. (A. 1049-68 (transcript), 1069-73 (Opinion and Order)).

On May 31, 2005, Huff and others filed a petition for a writ of mandamus, seeking to overturn Judge Sand's decision to forego mandatory restitution in light of his approval of the forfeiture settlement set forth in the USAO-Rigas Agreement (and, by extension, the NPA). Among other things, the petitioners claimed that the USAO-Rigas Agreement violated both the Crime Victims' Rights Act of 2004 and the Mandatory Victim Restitution Act, codified at 18 U.S.C. § 3663A, because their rights

"to be treated fairly and to be provided with full and timely restitution" had been violated, and because the USAO-Rigas Agreement made it "'virtually impossible'" for the victims to obtain full recovery for their losses. *See In Re Huff Asset Management*, 409 F.3d 555, 560 (2d Cir. 2005), *petition for reh'g denied* Aug. 18, 2005; (A. 1732-47). The petitioners also claimed that they had inadequate notice that the NPA would be attached to the USAO-Rigas Agreement provided to Judge Sand, and therefore that they did not have notice to object to the NPA. *See id.* at 564.

On June 3, 2005, this Court denied the petition for mandamus. *See generally id.* In rejecting the petitioners' claims, this Court acknowledged that "Congress recognized that there would be numerous situations when it would be impossible for multiple crime victims of the same set of crimes to be repaid every dollar they had lost." *Id.* at 563. This Court noted that there were "potentially tens of thousands of victims of the Rigases' crimes," and that "the amount of losses of those victims has not been established and doings so would indisputably take a great deal of time." *Id.* The Court further noted that "[t]o the extent that the Government recognizes that victims would have difficulty in effecting any recoveries from the Rigas family members because of difficulties in proof of culpability and because of security interests affecting the family's assets, petitioners cannot meet their burden in showing that the Government or the district court acted unreasonably in entering the [USAO-Rigas Agreement] or approving it." *Id.* at 564.

On June 6, 2005, after the writ of mandamus was denied, Judge Sand entered an order approving the USAO-

Rigas Agreement, finding it "to be fair and reasonable and in the best interests of all persons with an interest in" the Rigas prosecution. Judge Sand also agreed not to impose an order of criminal restitution, fine or any other economic sanction (other than the mandatory special assessments) in sentencing John or Timothy Rigas.

F. The Bankruptcy Court's Approval Of The Adelphia Settlement Agreements And The District Court's Affirmance

On April 28, 2005, Adelphia submitted the NPA, the Adelphia-SEC Agreement, and the Adelphia-Rigas Agreement to United States Bankruptcy Judge Gerber for approval, pursuant to Federal Rule of Bankruptcy Procedure 9019.* (A. 11-162). Because a key provision of the NPA was that the RMEs would be transferred to Adelphia "free and clear of all liens, claims, encumbrances, or adverse interests" (A. 60), Adelphia explained in its application to Judge Gerber that "[a]ny assertions of interest in the property being forfeited, including the [RMEs], is a claim that will be required to be brought in the District Court in connection with the ancillary forfeiture proceedings to be conducted pursuant to the [USAO-Rigas] Agreement" (A. 43), which Adelphia included in its submission (A. 129-62). In advance of the hearing on the settlement, at Judge Gerber's request, the Government submitted a letter brief outlining the Government's forfeiture authority, including the statutory provisions

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* "On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." Fed. R. Bankr. P. 9019(a).

governing notice and third-party claims, the limited criteria for third-party recovery, the relation-back doctrine, and the Attorney General's discretionary authority to use forfeited property to compensate victims of the federal criminal offense giving rise to the forfeiture. (A. 222-34). After considering objections and conducting a hearing, in an order entered on May 26, 2005, Judge Gerber approved the settlement agreements as fair and reasonable and in the best interest of Adelphia. *See In re Adelphia Communications Corp.*, 327 B.R. 143 (Bankr. S.D.N.Y. 2005); (SPA. 63-75).

On June 6, 2005, the Appellants filed a motion for reconsideration, citing two supposed developments since the bankruptcy court's decision: (1) statements made by Government counsel at the June 3, 2005, argument before this Court on the mandamus petition,* and the Supreme

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* The Appellants contended that the Assistant United States Attorney ("AUSA") arguing for the Government admitted weaknesses in the Government's forfeiture claims that were not acknowledged while negotiating with Adelphia's representatives, thereby purportedly undermining the basis for the 9019 Order. (A. 1749-50, 1754-55). The Appellants' assertion was not supported by either the record or the applicable law. The AUSA 's comments were made in the context of responding to a series of arguments by the Appellants, including defending the Government's ability to compromise petitions challenging a criminal forfeiture order, pursuant to 21 U.S.C. § 853(n); rebutting the Appellants' argument that 21 U.S.C. § 853(h) prohibited the Government from conveying the RMEs to

Court's intervening decision in *Arthur Andersen LLP* v. *United States*, 544 U.S. 696 (2005). (A. 1748-99). On June 13, 2005, Judge Gerber granted reconsideration but adhered to his May 20, 2005 decision. *See In re Adelphia Communications Corp.*, 327 B.R. 175 (Bankr. S.D.N.Y. June 13, 2005). (SPA. 76-82).

The Appellants then appealed Judge Gerber's 9019 order, and his order on reconsideration, to the United States District Court for the Southern District of New York. On February 23, 2006, Judge Kaplan heard oral argument and, the same day, issued an order affirming

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Adelphia; defending the reasonableness of the settlements (including the Government's agreement in advance, in the NPA, to compromise Adelphia's petition challenging the forfeiture of the RMEs by conveying the RMEs to Adelphia in exchange for $715 million); and addressing a question from a member of the panel whether the $715 million might be subject to claims by creditors. (A. 1698-701, 1707-14). The AUSA pointed out that the settlement agreements had removed three categories of potential claims to the RMEs—the security interests of the banks, Adelphia's claim to a constructive trust, and the security interests held by various trade creditors. (A. 1698-701). Although the Government believed it would prevail against each of these categories of challenges to the forfeiture of the RMEs, it did not go into those arguments at that time. Rather, the AUSA's point was that the settlement had addressed all of those potential claims in advance, thereby avoiding the possibility of unnecessary litigation.

Judge Gerber's decisions. *See Ad Hoc Adelphia Trade Claims Committee* v. *Adelphia Communications Corp.*, 337 B.R. 475 (S.D.N.Y. 2006); (SPA. 83-89). In answer to the Appellants' objection that the settlement violated the absolute priority rule by allowing the Government to make distributions from the Victim Fund to equity security holders whose interests would be inferior to those of the Appellants' in a plan of reorganization, Judge Kaplan held that "any payments from the restitution fund would be from 'a fund to be created and owned by the Government,' not a distribution of assets of the debtors' estates as part of a plan of reorganization." 337 B.R. at 478 (quoting *In re Adelphia*, 327 B.R. at 169); (SPA. 87-88). In clear recognition of the Government's powers under federal asset forfeiture law, Judge Kaplan also noted that, had Adelphia rejected the Government's settlement offer and the Government succeeded in forfeiting Adelphia's assets, "the government's interest in the assets would have been superior to those of the creditors in any case." 337 B.R. at 478; (SPA. 88).

Appellants filed Notices of Appeal to this Court on March 24, 2006. (A. 1852-63).

G. The Ongoing Criminal Forfeiture Proceedings

In accordance with the USAO-Rigas Agreement, on June 7, 2005, Judge Sand entered a Consent Order of Forfeiture pursuant to 18 U.S.C. § 981(a)(1)(C), 28 U.S.C. § 2461, and Rule 32.2(b) of the Federal Rules of Criminal Procedure, as to the Rigas Parties's interest in the real estate, securities, and RMEs listed in Exhibits C, E, and F to the USAO-Rigas Agreement.

On July 13, 2005, Judge Sand issued a Preliminary Order of Forfeiture as to Specific Property pursuant to the provisions of 21 U.S.C. § 853(n) and Fed. R. Crim. P. 32.2(b), which require publication and notice to third parties known to have alleged an interest in forfeited property and the disposition of any petitions filed under § 853(n) before the United States may have clear title to such property pursuant to 21 U.S.C. § 853(n)(2). (GA 2, 27-31). Notice of the forfeiture action was duly published, and notice of the forfeiture action was sent by certified mail to all persons and entities the Government believed might have an interest in the RMEs. (GA 3, 11).

On August 19, 2005, Adelphia filed a petition* claiming an interest in the RMEs, related real properties, and Adelphia securities, on the ground that they constituted property traceable to funds unlawfully pilfered from Adelphia. (GA 4). In light of the fact that, by that time, Adelphia intended to sell substantially all of its assets to Time Warner and Comcast pursuant to a Chapter 11 plan of reorganization, the Government and Adelphia agreed that effectuation of the restitution scheme that had been designed in the settlement agreements would be facilitated and expedited if the RMEs were forfeited to the United States and conveyed to Adelphia's designated subsidiaries as a first step in the forfeiture process. (GA 2). Accordingly, the Government and Adelphia entered into a Stipulation and Order of Settlement "[i]n furtherance of the

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* Adelphia's petition was subsequently amended on March 24, 2006, and September 19, 2006. (Ward Decl. p.5 n.2).

terms of" the NPA. (GA 41). Adelphia then withdrew its petition as to the RMEs, other third-party petitions were addressed, and the Government agreed to apply for orders forfeiting the RMEs, and all property traceable thereto, to the United States. As part of the NPA, the Government further agreed to convey the RMEs to Adelphia immediately thereafter. (A. 58-59).

On March 29, 2006, Judge Sand (i) endorsed the Stipulation and Order of Settlement between the Government and Adelphia as to the RMEs; (ii) entered a Final Order of Forfeiture as to the RMEs, forfeiting to the United States all right, title and interest in the RMEs, and all property traceable thereto (with certain reservations of third-party claims*); and (iii) immediately thereafter, entered an Amended Final Order of Forfeiture as to the RMEs, transferring all right, title and interest of the United States in the RMEs, and all property traceable thereto, to designated Adelphia subsidiaries. (GA 16-24).

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* Contingent petitions were filed by Bank of Montreal, Bank of America, N.A., and Wachovia Bank, N.A., asserting an ownership interest in certain of the FMEs to protect their interests against the contingency that Judge Gerber's 9019 order was overturned on appeal. Two local franchising cable franchising authorities also filed petitions to preserve its regulatory authority over the cable licenses of two of the FMEs. The interests asserted in these petitions were expressly preserved in the Court's Final Order of Forfeiture and Amended Final Order of Forfeiture.

The Government and Adelphia resolved Adelphia's petition as to nine real properties and other assets associated with the RMEs according to the same procedure.* On July 28, 2006, the Honorable Shira A. Scheindlin, sitting in Part I, (i) endorsed the Stipulation and Order of Settlement between the Government and Adelphia; (ii) entered a Final Order of Forfeiture as to Adelphia Real Property Interests, which forfeited to the United States all right, title and interest in nine real properties, and all property traceable thereto; and (iii) immediately thereafter, entered an Amended Final Order of Forfeiture as to the Adelphia Real Property Interests, transferring all right, title and interest of the United States in the properties, and all property traceable thereto, to designated Adelphia subsidiaries. (GA 77-87).

Forfeiture proceedings were also concluded as to two luxury condominium units owned by John J. Rigas and Timothy J. Rigas in Beaver Creek, Colorado. As permitted by the terms of the USAO-Rigas Agreement, John Rigas tendered $1.7 million to the United States in lieu of the forfeiture of his interest in the Greystone condominium. (Ward Decl. ¶ 12). In August 2006, following the resolution of two third-party petitions, Timothy Rigas's condominium in Beaver Creek was forfeited to the United States. (*Id.*). The United States Marshals Service marketed and sold the property, utilizing a local real estate broker, for $5 million. (*Id.*). The proceeds of the sale of these

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* The Government and Adelphia also resolved, in a separate stipulation, a third-party petition asserting mechanic's liens on one of the real properties.

condominiums, like the proceeds of the sale of the RMEs and related properties, will be held on deposit by the Government pending distribution to defrauded Adelphia investors. (*Id.*).

On July 31, 2006, Adelphia sold substantially all of its assets, including the RMEs and the associated real properties, to Time Warner NY Cable LLC and Comcast Corporation, for over $17 billion. The bankruptcy court authorized the sale in an order dated June 28, 2006, pursuant to 11 U.S.C. § 363. (Abrams Aff. ¶ 5).

The Government and Adelphia are in the process of finalizing the forfeiture to the United States and conveyance to Adelphia of the Adelphia securities formerly held by the Rigas Parties and certain time share properties in Cancun, Mexico. (Ward Decl. ¶ 13). Following entry of the final and amended final orders of forfeiture as to these properties, the Government will have fulfilled its obligations under the NPA to convey forfeited property to Adelphia, triggering Adelphia's obligation to pay $715 million to the Government. (Ward Decl. ¶ 13). The first installment—$200 million in cash—will be due and payable to the Government upon entry of the orders forfeiting and conveying the securities and time share properties. (Ward Decl. ¶ 13).

H. The Victim Fund

The Government intends to distribute the proceeds from the sale of the assets forfeited by the Rigas Parties to the victims of the Adelphia fraud, in accordance with the Attorney General's statutory authority to use forfeited property to compensate victims of the offense giving rise

to the forfeiture. (Ward Decl. ¶ 14). The distribution process will be conducted in accordance with the procedures governing petitions for mitigation or remission of forfeiture set forth in the Title 28, Part 9, of the Code of Federal Regulations. (*Id.*). In addition, the SEC, in its parallel civil enforcement actions, has to date collected approximately $70 million, which it intends to distribute to the same class of victims. (*Id.*).

Due to the large number of potential victims, and the labor-intensive process of identifying and notifying them, verifying and processing petitions, and recommending a pro rata distribution to the Attorney General, the Office has retained a special master to administer this process under the Government's direction, as authorized by the applicable federal regulations. (Ward Decl. ¶ 15). After a joint selection process conducted by the Office and the SEC, on September 13, 2006, the Office announced the retention of Richard C. Breeden, Chairman of Richard C. Breeden & Co., to serve as Special Master on behalf of the Department of Justice. (*Id.*). After completing the notification and claims processing procedures, Mr. Breeden will recommend a fair and equitable distribution plan to the Government. (*Id.*).*

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* Mr. Breeden served as Chairman of the SEC from 1989 to 1993. His firm has been involved in the administration and distribution of securities fraud claims since 1996. (Ward Decl. ¶ 16). From 2002 to early 2006, Mr. Breeden served as Corporate Monitor in the WorldCom matter. (*Id.*). He was also appointed by United States District Judge Jed S. Rakoff as Distribution Agent for the

ARGUMENT

POINT I

Because There Is No Effective Relief That Can Be Afforded The Appellants Without Rescission Or Reformation Of The Settlement Agreements, This Appeal Should Be Dismissed As Moot

The terms of the NPA, the USAO-Rigas Agreement, and the other three settlement agreements were the product of extensive and painstaking negotiations. As the Appellants acknowledge, throughout these negotiations, the Government made clear that its complete discretion to disburse the restitution fund to victims in the manner it sees fit was critical to any non-prosecution agreement. *See* Appellants' Br. at 14.* Now, in an attempt to preserve this

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$750 million fund for WorldCom fraud victims. (*Id.*).

* The Appellants explain in their overview of the negotiations that led to the non-prosecution agreement:

> Although the Government ultimately reduced its $1 billion demand to $715 million, the Government insisted that it would have complete discretion to disburse restitution funds *in any manner it sought fit.* (A-296; A-404) Indeed, the Debtors' Lead Director Anthony Kronman testified that the Government expressly—and brazenly—communicated to him its intention to distribute funds to stockholders who

Court's jurisdiction over the appeal, the Appellants invite this Court to modify the terms of the NPA—over the objections of both of its signatories—by giving the bankruptcy court the authority to disburse the victim funds according to bankruptcy priority rules. *See* Appellants' Opposition to Motion to Dismiss at 10. Such a modification would effectively rewrite not just the NPA, but, by extension, all of the other agreements as well. Because the relief that the Appellants seek would stymie the very purpose of these agreements—to create a victims' fund of $715 million to be distributed by the Attorney General—there is no relief that could be granted to the Appellants by this Court that would not require rescission or reformation of the agreements, and the appeal should therefore be dismissed as moot.

In this respect, the Government concurs in the Appellees' position, which thoroughly addresses why this Court should not consider such extraordinary and unprecedented relief. As the Appellees correctly point out, neither the bankruptcy court, the district court, nor this Court may modify the terms negotiated by Adelphia and this Office. *See* Joint Brief of Appellees and Cross-Appellant, dated Aug. 7, 2006, at 36-37, n.34; Appellees' Motion to Dismiss Appeal, dated Aug. 7, 2006, at 13-14, n.10; Appellees' Reply Brief in Further Support of Motion to Dismiss Appeal, Sept. 20, 2006, at 7.

> would otherwise be subordinated to the Debtors' unsecured creditors. (A-294-50).

Appellants' Br. at 14 (emphasis added).

Were this Court to direct a particular distribution of the victims' fund, it would effectively rewrite the NPA in a manner intended neither by the Government nor Adelphia. Such a result is impermissible. *See, e.g.*, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) ("Neither the district court nor this court have the ability to 'delete, modify or substitute certain provisions.' The settlement must stand or fall in its entirety.") (quoting *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 630 (9th Cir. 1982)); *In re Continental Airlines*, 907 F.2d 1500, 1520 (5th Cir. 1990) ("neither the bankruptcy court nor the district court had any authority to change the terms of the settlement"); *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1160 (11th Cir. 1983) ("Courts are not permitted to modify settlement terms or in any manner to rewrite the agreement reached by the parties.").*

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* Nor can a court enforce only selected portions of a settlement agreement. *See Columbus-Am. Discovery Group v. Atl. Mut. Ins. Co.*, 203 F.3d 291, 299 (4th Cir. 2000) ("Authority to enforce [a settlement], however, applies to the agreement in its entirety, not to such selected parts that the court deems appropriate."); *Brown v. County of Genesee*, 872 F.2d 169, 173 (6th Cir. 1989) (per curiam) (observing that it is "well established that a 'court must enforce the settlement as agreed to by the parties and is not permitted to alter the terms of the agreement'") (quoting *Brock v. Scheuner Corp.*, 841 F.2d 151, 154 (6th Cir. 1988)); *In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*, 687 F.2d 626, 629 (2d Cir. 1982) ("It is beyond a district judge's discretion to alter the terms or refuse to enforce a settlement agreement,

The analysis of the Eleventh Circuit in *Brooks v. Georgia State Board of Elections*, 59 F.3d 1114 (11th Cir. 1995), in instructive. At issue in *Brooks* was the district court's rejection of a consent decree that would have governed the appointment of judges in Georgia. *See id.* at 1117. By the time the appeal reached the Court of Appeals, the case had become moot because various deadlines set in the consent decree had passed. *See id.* at 1119–20. The Eleventh Circuit held that neither it "nor the district court ha[d] the power to modify the effective dates in the proposed settlement agreement in order to afford meaningful relief and escape the jurisdictional bar of mootness." *Id.* at 1120 (citation omitted). Noting that it had "found no authority for the proposition that a federal court may modify the terms of a voluntary settlement agreement between parties before a decree has been entered," the court explained that "the duty of an appellate court is simply to ascertain whether or not the trial judge clearly abused his discretion in approving or rejecting a settlement agreement" and that the court is "not free to delete, modify or substitute certain provisions of the settlement." *Id.* at 1119–1120 (citations and quotation marks omitted). As here, the court had "no way of reading the minds of the parties to ascertain their evaluation of the circumstances under which they settled or the importance of the discrete terms of the agreement." *Id.* at 1120; *Matter of Crystal Oil Co.*, 854 F.2d 79, 81 (5th Cir. 1988) ("We decline to deprive [a party] of the benefits it bargained for without giving [it] a chance to reevaluate the concessions it made to get them.").

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absent special circumstances . . . .").

In addition to eradicating agreed-upon settlement terms in the NPA, an order remanding this appeal with instructions for the bankruptcy court to direct a particular distribution would run afoul of Judge Sand's forfeiture order in the Rigas' prosecution and thus deprive the victims of the benefits of the Victim Fund as approved by Judge Sand. On June 7, 2005, after the bankruptcy court approved the NPA, Judge Sand adopted the consent forfeiture order reflecting the terms of the NPA. Judge Sand determined that a court order establishing restitution to specific victims was impracticable given the complexity of the case. *See* 18 U.S.C. § 3663A(c) (providing that a court need not order restitution to victims if impracticable); *see also In Re Huff Asset Management*, 409 F.3d at 564 (concluding that Judge Sand did not abuse his discretion in deciding to accept the USAO-Rigas Agreement because of the complexity of the victim restitution issues and the difficult in establishing the losses)). The court thus found that victim compensation was best effectuated through the Attorney General's authority to use forfeited property for restitution—a finding that was essentially affirmed by this Court in rejecting the petitioners' request for a writ of mandamus. *See In Re Huff Asset Management*, 409 F.3d 555. In sum, the Government and Adelphia carefully negotiated the settlement terms contained in the NPA, including the provision protecting the Government's exclusive discretion to distribute the fund to victims. The bankruptcy court had the option of either approving or rejecting a proposed settlement by the parties; "'the settlement must stand or fall as a whole.'" *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991) (quoting

Officers for Justice v. Civil Serv. Comm'n of San Francisco, 688 F.2d at 630)).

Moreover, in addition to effectively undoing Judge Sand's findings with respect to the forfeiture and victim restitution schemes proposed by the Government, adopting the Appellants' arguments in this case would also affect other aspects of the various agreements at issue, which have proceeded during the course of this litigation. For example, as noted above, the Government has not sought an indictment of Adelphia, and the SEC has not pursued its claim against Adelphia. Adelphia has now sold substantially all of its assets—*including the RMEs and the associated real properties*—to Time Warner NY Cable LLC and Comcast Corporation, and the bankruptcy court has authorized the $17 billion sale. (Abrams Aff. ¶ 5). And, the Government and Adelphia have now satisfied all but a few of the conditions precedent to Adelphia making its first payment into the victim restitution fund. All that remains is the entry of the final and amended final orders of forfeiture as to certain Adelphia securities and time share properties formerly held by the Rigases, and then Adelphia will be required to make its $200 million in cash into the fund. Indeed, the Government has recently retained a special master, Richard C. Breeden, to administer the process of compensating victims of the Adelphia corporate fraud with the $715 million in the restitution fund. Permitting the bankruptcy court to disburse the victim restitution funds obtained by the Government through these various agreements, which was certainly *not* the Government's intent in entering the USAO-Rigas Agreement and the NPA, would effectively result in the reformation of all of the agreements and would undo the

progress that Adelphia has made in resolving its bankruptcy estate (which includes the favorable result it obtained through the NPA of avoiding indictment) and the progress that Adelphia and the Government have made in finalizing the victim restitution fund.

Finally, it simply cannot be said that a dismissal of this appeal would somehow result in an injustice to the Appellants. They have certainly had a full and fair opportunity to litigate their claims. They have contested Judge Sand's adoption of the USAO-Rigas Agreement (which attached the NPA), and sought a writ of mandamus from this Court to seek to overturn Judge Sand's decision. *See In Re Huff Asset Management*, 409 F.3d 555. They have similarly fought to prevent the bankruptcy court from adopting the three agreements involving Adelphia directly, including the NPA, and, when their claims were rejected by Judge Gerber, they appealed to Judge Kaplan, and were similarly denied. At this point, having repeatedly lost at every stage in the proceedings, and given the fact that the parties to the agreements have taken numerous steps in reliance upon the agreements that the Appellants have challenged and been rebuffed, there is simply no way to provide any effective relief to the Appellants that would not undo the entire interlocking set of arrangements.

Accordingly, in the Government's view, because no effective relief can be afforded to the Appellants, this appeal should be dismissed as moot.*

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* It is worth noting that the Appellants are not completely without recourse if the appeal is dismissed. In their brief, they seem to assume that they are ineligible to

POINT II

In The Alternative, The District Court's Order Should Be Affirmed*

To the extent that this Court concludes that the appeal should not be dismissed as moot, then the Government urges the Court to affirm Judge Kaplan's order. While the Government generally agrees with the arguments raised by the Appellees in support of affirmance, in the Government's view, Judge Kaplan's decision affirming Judge Gerber's 9019 Order may also be affirmed on two other grounds which uniquely involve the interests of the United States and its criminal forfeiture powers. First, under the so-called "relation back" doctrine, title in the forfeited

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recover from the $715 restitution fund. *See* Appellants' Br. at 26. This is untrue. The Appellants, like other victims of the fraud, may submit claims by filing a petition for mitigation or remission seeking to recoup their allowable losses out of the forfeited funds the Government has secured for the benefits of victims. To date, no decision has been made as to which security holders can recover from the fund or whether bond holders will be excluded in favor of equity holders.

* While the Government recognizes that the arguments contained in this point are not directly responsive to the Court's November 13, 2006 order inviting the Government to submit a brief as *amicus*, the Government had intended to make these arguments in its Statement of Interest, which it is not filing as a result of its submission of this *amicus* brief.

entities—the RMEs—vests with the Government at the time of the offense; thus, permitting the bankruptcy court to dispense the monies in the victim restitution fund pursuant to bankruptcy priority rules would deprive the Government of property to which it has superior title through the operation of the federal forfeiture laws since the fund contains monies exchanged for the forfeited RMEs. Second, the Appellants' request for a remand with instructions that the $715 million be distributed according to the bankruptcy rules would also vitiate the Attorney General's exclusive statutory authority to remit forfeited property to victims, pursuant to 21 U.S.C. § 853(i). Accordingly, and for the myriad other reasons set forth by the Appellees, this Court should affirm Judge Kaplan's affirmance of the bankruptcy court's 9019 Order.

A. Applicable Law

Title 18, United States Code, Section 981(a)(1)(A), and Title 28, United States Code, Section 2461(c), provide for mandatory criminal forfeiture of all property constituting, or derived from, proceeds traceable to the fraud offenses of which John and Timothy Rigas were convicted.* This

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* Pursuant to 18 U.S.C. § 981(a)(1)(C), "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to . . . any offense constituting 'specified unlawful activity' (as defined in [18 U.S.C. § 1956(c)(7)]), or a conspiracy to commit such offense," is subject to forfeiture to the United States. This provision, standing alone, is a civil forfeiture provision. However, where federal law provides for civil forfeiture but there is no parallel criminal forfeiture provision, criminal forfei-

same statutory scheme would have applied had the Government not entered into the NPA with Adelphia and if the company had been indicted—forfeiture of the proceeds of the charged criminal offenses would be mandatory upon conviction under the same statutory scheme.

Under the relation-back doctrine, title to criminal proceeds for forfeiture purposes vests in the United States at the time that the crime occurs. *See* 21 U.S.C. § 853(c) (all right, title and interest in forfeited property vests in the United States upon the commission of the acts giving rise to their forfeiture); *see Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 627 (1989); *United States* v. *United States Currency*, 895 F.2d 908, 916 (2d Cir. 1990); *United States* v. *Nava*, 404 F.3d 1119 (9th Cir. 2005). As this Court has stated, because "the forfeiture occurs when the crime is committed," a defendant has no interest in the forfeited property "as of that moment." *United States* v. *United States Currency*, 895 F.2d at 916. Criminal proceeds therefore remain the property of the United States even if they are subsequently transferred to a third party, unless the transferee can establish that he was a bona fide purchaser for value and, at the time of the purchase, was reasonably without cause to believe the property was subject to forfeiture. *See* 21 U.S.C. § 853(c).

The procedures governing such forfeitures are set forth in 21 U.S.C. § 853 and Rule 32.2 of the Federal Rules of Criminal Procedure. *See* 28 U.S.C. § 2461(c). After a defendant is convicted of an offense carrying a penalty of

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ture is mandated nonetheless, pursuant to 28 U.S.C. § 2461(c).

forfeiture, the district court must enter a preliminary order of forfeiture divesting the defendant of his interest in the forfeitable property, without regard to the interest of potential third parties. *See* Fed. R. Crim. P. 32.2(b)(1), (2). The Government must publish notice of the forfeiture and provide individual notice, where practicable, to persons known to have alleged an interest in the property. *See* 21 U.S.C. § 853(n)(1). A third party challenging the forfeiture must file a timely petition and prove either (i) that he had a legal interest in the property at the time of the offense that was superior to the defendant's interest; or (ii) that he acquired an interest in the property after the offense as the result of a "purchase," and at the time was without reason to believe the property was subject to forfeiture. *See* 21 U.S.C. § 853(n)(6).

A hearing on the petition is necessary only where there are facts in dispute that must be resolved. *See, e.g., United States* v. *Martinez*, 228 F.3d 587, 589 (5th Cir. 2000). The court may dismiss the petition on the pleadings for lack of standing or failure to state a claim. *See, e.g., Pacheco* v. *Serendensky,* 393 F.3d 348, 352 (2d Cir. 2004); *United States* v. *BCCI Holdings (Luxembourg) S.A.*, 919 F. Supp. 31, 36 (D.D.C. 1996). The district court may also grant summary judgment to a party, but only after some discovery has taken place in the ancillary proceedings. *Pacheco*, 393 F.3d at 352; *cf.* Fed. R. Crim. P. 32.2(c)(1)(B) (permitting court-authorized discovery in ancillary proceeding). Of course, the Government may compromise third party petitions—for example, by turning over forfeited property as part of a settlement. *See* 21 U.S.C. § 853(i)(2). When all third party petitions have been addressed, the court is then authorized to enter a final order of forfeiture

giving the United States clear title to the property. *See* 21 U.S.C. § 853(n)(7); Fed. R. Crim. P. 32.2(c)(2).

Congress granted the Attorney General broad discretionary authority to use forfeited property to compensate victims of the offenses giving rise to the forfeiture. This authority is codified in 21 U.S.C. § 853(i), which provides in pertinent part:

> With respect to property ordered forfeited under [§ 853], the Attorney General is authorized to—
>
> (1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of [the criminal statute giving rise to the forfeiture], or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section. . . .

21 U.S.C. § 853(i)(1).

Petitions for mitigation or remission of forfeiture are decided by the Chief of the Asset Forfeiture and Money Laundering Section of the Criminal Division of the Department of Justice ("AFMLS"), according to the criteria set forth in 28 C.F.R. Part 9. (Ward Decl. ¶ 6). The Government may also contract with a special master to notify potential petitioners, process petitions, and make recommendations to the Chief of AFMLS on the distribution of forfeited property to petitioners. *See* 28 C.F.R. § 9.9(c); *cf. United States* v. *Bright*, 353 F.3d 1114, 1123-24 (9th Cir. 2004) (holding that courts are not required to

apply forfeited funds to restitution because, among other things, it would conflict with the discretion granted by law to the government to decide whether to retain funds or restore them to victims).

B. Discussion

1. Because Title To The RMEs Vested In The United States At The Time Of The Fraud, The Funds Exchanged For The RMEs Are Not Estate Property

The Appellants' entire argument is based on the incorrect assumption that the $715 million to be paid to the Government by Adelphia is part of the bankruptcy estate. *See* Appellants' Br. at 25, 29, 38; Appellants Joint Reply Brief at 1-2, 4, 6. Because the $715 million is to be paid by Adelphia in exchange for the forfeited RMEs, those funds are not estate property. Rather, those funds become the forfeited *res* in lieu of the RMEs, title to which vested in the United States at the time of the commission of the offenses charged in the Superseding Indictment. *See* Appellants' Br. at 9-10 (acknowledging the Government alleged in the 2002 Rigas indictment that the RMEs were forfeitable property). Thus, these assets are not part of the estate, and bankruptcy priority rules have no application to the disposition of the $715 million restitution fund.

The relation back doctrine, as codified in 21 U.S.C. § 853(c), is a well-established principle of forfeiture law. *See Caplin & Drysdale*, 491 U.S. at 627 (citing *United States* v. *Stowell*, 133 U.S. 1 (1890); S. Rep. No. 98-225, p. 200 & n.27 (1983)); *United States* v. *Monsanto*, 491 U.S. 600, 613 (1989). Under the relation back doctrine, the

Government's interest in forfeitable property vests at the time of the offense giving rise to the forfeiture. *See* 21 U.S.C. § 853(c) ("All right, title, and interest in [forfeitable] property . . . vests in the United States upon the commission of the act giving rise to forfeiture under this section."); *United States Currency*, 895 F.2d at 916, (Because "the forfeiture occurs when the crime is committed," a defendant has no interest in the forfeited property "as of that moment."); *United States* v. *Nava*, 404 F.3d at 1124 (Government's interest vested at the onset of drug conspiracy that property facilitated); *United States* v. *Hooper*, 229 F.3d 818, 822 (9th Cir. 2000) (Government's interest in property vested immediately "upon the commission of the act giving rise to forfeiture" and therefore wife of convicted drug dealer lacked interest in husband's property); *Martinez*, 228 F.3d at 590 (relation back doctrine vests title to criminal proceeds in Government at time the crime occurs, thus precluding defendant's wife from ever acquiring an interest under community property law).

Because the United States, in effect, became the sole legal owner of the RMEs at the moment the Rigases bought or upgraded them with the proceeds of their fraud, and that title was perfected when the final orders of forfeiture were entered in March and July, 2006, the $715 million *to be paid by Adelphia in exchange for that property* pursuant to the terms of the NPA cannot, under any interpretation, be estate property. Rather, that money is simply payment for forfeited property; it will therefore properly be deposited by the United States Marshals Service into the Department of Justice Assets Forfeiture Fund. *See* 21 U.S.C. § 853(h) (the "Attorney General shall

direct the disposition of [forfeited property] by sale or any other commercially feasible means"); 28 U.S.C. § 524(c) (establishing Department of Justice Assets Forfeited Fund). This money will ultimately be distributed, in the exercise of the Attorney General's discretion, to victims of the offense.

Indeed, had the Government not agreed in the NPA to convey the RMEs and other properties—which Adelphia had been managing all along*—to Adelphia, and had sold the forfeited cable companies to someone else, those proceeds would likewise have been properly deposited into the Assets Forfeiture Fund and disbursed to victims. The situation here is not materially different.

As the Government acknowledged at the time, Adelphia was required to obtain the bankruptcy court's approval of the NPA (as well as its settlement agreements with the SEC and the Rigas Parties), pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure. *See* A-61. Adelphia sought the court's approval based upon the overall reasonableness of its decision to enter into the settlements, and did not specifically argue that the funds it would furnish in exchange for the forfeited Rigas property would not come out of the estate. However, in advance of the hearing on the settlement, at Judge Gerber's request, the Government submitted a letter brief outlining the Government's forfeiture authority, including the statutory provisions governing notice and third-party claims, the limited criteria for third-party recovery, the relation-back

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* *See* NPA, A. 58-59, 61 (describing Adelphia's obligation to continue to manage and operate the RMEs).

doctrine, and the Attorney General's discretionary authority to use forfeited property to compensate victims of the federal criminal offense giving rise to the forfeiture. (A. 222-34). The Government's position was, thereby, made known to the bankruptcy court. Indeed, as Judge Gerber held in granting Adelphia's motion, payments to investors from the Victim Fund would be from "a fund to be created and owned by the Government," not a distribution of assets from Adelphia's estate, *In re Adelphia*, 327 B.R. at 169, a holding relied upon by Judge Kaplan in his order affirming Judge Gerber's decision, *see* 327 B.R. at 478 ("As Judge Gerber held, any payments from the restitution fund would be from a 'fund to be created and owned by the Government,' not a distribution of assets of the debtors' estates as part of a plan of reorganization. They therefore would not come within the language of Section 510(b) and 1129 of the [Bankruptcy] Code." (footnotes omitted)).

Accordingly, because the RMEs and related property were Government property, not estate property, the funds exchanged for the RMEs simply cannot be considered estate property. Thus, the bankruptcy priority rules have no bearing on the distribution of the $715 million to be paid by Adelphia to the Government.

2. The Attorney General's Authority Under 21 U.S.C. § 853(i) To Distribute Forfeited Property To Fraud Victims Is Not Subject To Bankruptcy Court Approval

Pursuant to 21 U.S.C. § 853(i), the Attorney General has the exclusive authority to restore forfeited property to victims of the crime. Because the decision whether to distribute forfeited property to victims, and in what amounts, is the sole prerogative of the Attorney General, it cannot be assigned by this Court to a bankruptcy court. Any modification of the terms of the NPA to require a particular distribution scheme would run afoul of this exclusive authority, as well as the express terms of the NPA.

Federal forfeiture law confers upon the Attorney General the sole authority to determine whether forfeited property will be used to compensate victims of the offense giving rise to the forfeiture. The Attorney General may, in his or her sole discretion, "restore forfeited property to victims" or "grant petitions for mitigation or remission of forfeiture." 21 U.S.C. § 853(i). Persons who believe they are victims of the relevant offenses may file such "petitions for mitigation or remission of forfeiture," and argue that they meet the criteria for recovery set forth in 28 C.F.R. Part 9. A successful petitioner will be paid out of the Assets Forfeiture Fund.

A recent decision of this Court, arising from the analogous circumstance of the SEC's distribution of civil penalties to victims, confirms that the $715 million to be paid by Adelphia for victim restitution is not subject to the

bankruptcy priority rules. In *Official Committee of Unsecured Creditors of Worldcom, Inc.* v. *Securities and Exchange Commission*, 467 F.3d 73 (2d Cir. 2006) ("*Worldcom*"), the unsecured creditors of Worldcom challenged the SEC's distribution scheme for defrauded investors in the civil enforcement proceeding. At issue was the Fair Fund provision of the Sarbanes-Oxley Act of 2001, Pub. L. No. 107-204, 116 Stat. 745 (2002), which allows the SEC to distribute civil penalties it obtains in enforcement actions for violations of the securities laws to the victims of the securities violations. *See* 15 U.S.C. § 7256(a). The Fair Fund provision is similar to 21 U.S.C. § 853(i) in that it grants a government agency—in the case of the Fair Fund provision, the SEC—the sole discretion to distribute civil penalties and disgorgement funds to defrauded investors in civil enforcement proceedings. *See* 15 U.S.C. § 7256(a).

In *Worldcom*, this Court held that the Fair Fund provision is not subject to bankruptcy priority rules. *See Worldcom*, 467 F.3d at 84-85. Specifically, this Court rejected the argument of the unsecured creditors that their exclusion from the SEC's distribution scheme for civil penalties ran afoul of bankruptcy's priority rules—the identical argument being made by the Appellants here. *See id.* This Court declared that "we see no indication in the Fair Fund provision . . . that the SEC must follow the Bankruptcy Code's claim priorities when developing a distribution plan." *Id.* at 85. This Court's reasoning should apply with equal, if not greater, force in the context of criminal forfeiture and the Attorney General's law enforcement powers.

In this case, the Government structured the forfeiture and restitution procedures that were part of the process of sentencing John and Timothy Rigas in counterpart to the NPA, in order to maximize the recovery for victims of the corporate fraud. Both the USAO-Rigas Agreement and the NPA expressly state that the Government will have unfettered discretion to determine how the funds will be distributed to victims. (A. 59, 135). As the NPA states, in plain and unambiguous terms, the United States will distribute the $715 million in "restitution to such victims in such forms and amounts as determined by the Attorney General and the SEC, *in their sole discretion*, subject to any applicable court approval process." (A. 59 (emphasis added)).

There is, accordingly, no merit to the Appellants' suggestion that the phrase "subject to any applicable court approval process" signaled the Government's agreement that its distribution of the restitution fund would be subject to judicial review. As Adelphia has correctly argued, the reference to "any applicable court approval process" with respect to a distribution plan refers solely to the criminal prosecution of the Rigases, over which Judge Sand was presiding. *See* Adelphia Reply Motion to Dismiss at 1-5. Although the settlement agreements contemplated that Judge Sand would forego orders of restitution in light of the forfeiture proceedings agreed to and designed the agreements, at the time the Settlement was executed, Judge Sand had not yet issued his decision to forego mandatory restitution orders against the Rigas defendants and, had he done so, the restitution process would have been subject to the statutorily-defined judicial approval process set forth in 18 U.S.C. § 3664. Judge Sand ulti-

mately declined to impose orders of restitution (obviating the associated "court approval process"), finding instead the statutory restitution process was impracticable given the complexity of the case and that victim compensation would be maximized, and best effectuated, through the criminal forfeiture process outlined in the interlocking USAO-Rigas Agreement and the NPA and the Attorney General's ability to use forfeited property to compensate victims—a determination that is not subject to the oversight of a bankruptcy court. *See* 21 U.S.C. 853(i); see also *Worldcom*, 467 F.3d at 85.*

Similarly, nothing in the bankruptcy court record suggests that Judge Gerber intended to, or believed he was empowered to, retain any ongoing supervisory role over distributions from the Victim Fund. To the contrary, Judge Gerber found that the distribution scheme of the Victim Fund was *not* an issue to be decided by the bankruptcy court. *See* SPA-48-52. Rather, Judge Gerber understood, properly, that his role was limited to determining whether

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* As the Appellees correctly point out, *see* Appellee Reply Br. Motion to Dismiss at 2-4, in the hearing on the settlement agreements, Judge Sand specifically rejected the argument made by Huff that the court should retain jurisdiction to entertain challenges to the distribution plan once it was announced, finding that the settlement was in the best interests of the victims. As the Government pointed out at that time, forfeiture law clearly committed any distribution to the victims of the offenses committed by John and Timothy Rigas to the Government's sole discretion. See A-983-84, 1064-73).

the settlement agreements were fair and reasonable consistent with applicable standards. *See* Adelphia Reply Motion to Dismiss at 1–5.

Distribution of the funds exchanged for the forfeited property in this case from the Assets Forfeiture Fund to victims of the offenses is, therefore, not subject to the bankruptcy priority rules given the Attorney General's exclusive authority to distribute forfeited property to victims pursuant to 21 U.S.C. § 853(i).

CONCLUSION

The appeal should be dismissed as moot, or, in the alternative, the order of the district court should be affirmed.

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December 1, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief does not comply with the type-volume limitation of Rule 29(a), but is being submitted pending resolution of the Government's motion for leave to file an oversized brief. As measured by the word-processing system used to prepare this brief, there are 11,859 words in this brief.

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